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A

TREATISE

OF THE

Pleas of the Crown.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE.

Quid triſtes querimoniæ,
Si non ſupplicio culpa reciditur.
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VOL. II.

400559
25.2.42

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, LAW-BOOKSELLER, FLEET-STREET,
AND J. COOKE, ORMOND-QUAY, DUBLIN.
1803.

A

TREATISE

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VOL. II.

LONDON:

CHAP. XV.

BURGLARY.

Definition.

A breaking and entering the Manſion-Houſe of another in the Night, with Intent to commit ſome Felony within the ſame. - - - § 1.

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Burglary.

§ 1.
Definition.
3 Inst. 63.
1 Hale, 549, &c.
Sum. 79.
1 Hawk. ch. 38. § 1.
4 Blac Com 224.
Staundf 30.
1 Bac. Abr. 539.
Crompt. Just. 31.

BURGLARY, which is derived from the German burg, a house, and laron or latro, a thief, is a felony at common law, and is generally defined to be,—A breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether such intent be executed or not. The learning upon this subject will best be exhibited under the several parts of this definition.

1. *What is a breaking.*
2. *An entering.*
3. *A mansion-house.*
4. *Of whom.*
5. *In the night.*
6. *As to the intent.*

1. There

Ch. XV. §2. *Breaking.*

1. There must be a breach of the house made or procured by the act of the felons; and this either by construction of law, or by actual force.

§ 2.

But though generally speaking every entry by a trespasser be a breaking in law, yet that is not sufficient in this case; for the words of the indictment are, feloniously and burglariously broke, &c. Therefore if the door or window be left open, and the thief enter and take away the goods in the night, that will not constitute a burglary. Though it is otherwise if a thief enter by a chimney, because it is as much inclosed as the nature of the thing will admit of. To amount to a breaking within this branch of the definition, the entrance must be obtained either by fraud, conspiracy, threat, or force; these will be illustrated by different examples.

1 Hale, 551, 2, &c. 3 Inst. 64. Kel. 67. 70. 1 Hawk. ch. 38. s. 4. Sum. 80, 1. 1 Bac. Abr. 539. 4 Blac. Com. 222. Dalt. ch. 151 s 3. Crompt. Just. 32.

By fraud.

Thieves having an intent to rob raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they bound the constable and robbed the owner; held burglary. So if admission be gained under pretence of business: or if one take lodgings with a like felonious intent, and afterwards rob the landlord: for the entrance was gained by fraud; and the law will not endure to have its justice defrauded by such evasions. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein.

1 Hawk. ch. 38. s. 5. 1 Hale, 552. 3 Inst. 64. Sum. 81. 4 Blac Com. 226. Kel. 44. 82. 2 MS. Sum. 300, 1, 4. Lemott's case, Kel. 42. Branton's case, O. B. May 1784. Sess. Pap. 738. Cassy and Cotter's case, Kel. 63. Farre's case, Kel. 43. Post. tit. Larceny.

At the Old Bailey sessions before Easter term 1704, Ann Hawkins was indicted of burglary: and upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country. That meeting with the boy who kept the key, she desired him to go with her to the house, and to induce him promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time, Holt C. J., Tracy, and Bury adjudged it to be clearly burglary in the woman; for she prevailed with the boy by fraud to open the door with intent that she might rob the house: and Lord Holt relied upon Le Mott's case.

Ann Hawkins's case, MS. Tracy, 80. & MS. Sum.

Ante, Kel. 42. & 63.

Ch. XV. § 2. *Breaking.*

How far it might be conſidered as a breaking, if a ſervant acting in confidence and with the aſſent of his maſter let robbers in by agreement with them to ſteal, but in truth with a view to their apprehenſion, was the ſubject of much debate and doubt in Eggington's caſe; which is elſewhere ſet forth.

Eggington's caſe, tit. Larceny, & poſt. 494.

By conſpiracy. 1 Hale, 553.

In the next place, if A. the ſervant of B. conſpire with C. to let him in to rob B., and accordingly A. in the night-time opens the door or window and lets him in; this is burglary in C.; but according to Dalton, ch. 99. only larceny in A.: yet by Lord Hale, it ſeems to be burglary in both; for if it be burglary in C., it muſt needs be ſo in A., becauſe he is preſent and aiding C. to commit the offence: and Hawkins, who is of the ſame opinion, compares it to the caſe where divers come to commit burglary, and ſome ſtand to watch in adjacent places, and others enter and rob: for in all ſuch caſes the act of one is in judgment of law the act of all.

Burnet's MS. Sum. 81, 2. acc.

1 Hawk. ch. 38. ſ. 8, 9.

1 Hale, 439. 534, 5, 6. 3 Inſt. 64.

Joſhua Cornwall was indicted with another perſon for burglary; and it appeared that he was a ſervant in the houſe; and in the night-time opened the ſtreet door and let in the other priſoner, who robbed the houſe: after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted at the trial whether this were burglary in the ſervant, he not going out with the other. But afterwards at a meeting of all the judges at Serjeants'-Inn, they were unanimouſly of opinion that it was burglary in both: and accordingly Cornwall was executed.

Joſh. Cornwall's caſe, 2 Stra 881. 10 St. Tr. 433. n. 4 Blac. Com. 227.

By threats. 2 MS. Sum. 298. 1 Hale, 553. Crompt 32. 1 Hawk. ch. 38. ſ. 4. poſt. ſ. 7.

There may alſo be a breaking in law, where, in conſequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehenſion of the force, or with a view more effectually to repel it, opens the door, through which the robbers enter,

Sum. 81. 2 MS. Sum. 300. 1 Hawk. ch. 38. ſ. 3. (Contra Dalt. ch. 151. ſ. 3.) Sav. 59. Crompt. 31.

But if the owner only throw his money out of the houſe to the thieves who aſſaulted it, this would not be burglary: though if the money were taken up in the owner's preſence, it would be robbery. In all other caſes where no fraud or conſpiracy is made uſe of, or violence commenced or threatened, in order to obtain an entrance, there muſt be an actual breach of ſome part or other of the houſe; though it need not be accompanied with any violence as to the manner of executing it

Sum. 80.

As

As to what shall be considered as a sufficient breach of the house in point of fact.

§ 3. *Breach of what part of the house.* 2 MS. Sum 80. 1 Hale, 552. 1 And. 114. 4 Blac Com 226. Hutt 20. Dalt. ch 151. f. 3. Crompt. Just. 31. b.

The breaking a window, taking a pane of glass out by drawing or bending the nails or other fastening, the drawing a latch where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or fastening of a window with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; are all instances of a breaking.

Wm. Brown's case, Winton Sp. Ad. 1799. cor. Buller J. MS.

On an indictment for burglary in the dwelling-house of George Aldridge, it appeared that the place which the prisoner entered was a mill under the same roof and within the same curtilage as the dwelling-house. Through the mill was an open entrance or gateway capable of admitting waggons, and intended for the purpose of loading them more easily with flour, through a large aperture or hatch over the gateway communicating with the floor above. This aperture was closed by folding doors with hinges which fell over it, and remained closed by their own weight, but without any interior fastening; so that those without under the gateway could push them open at their pleasure by a moderate exertion of strength. In this manner the prisoner was proved to have entered the mill in the night, with the evident intention of stealing the flour. And Buller J. held this a sufficient breaking to constitute the offence; and the prisoner was accordingly convicted.

Roberts's alias Chambers's case, O. B before Hil. T. 1702 MS. Tracy, 80.

Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken; this was ruled burglary by Ward Ch. B., Powis, and Tracy Js. and the Recorder. But they thought this the extremity of the law: and on a subsequent conference, Holt C. J. and Powell J. doubting, and inclining to another opinion, no judgment was given.

1 Hale, 550. & *vide* Crompt. Just. 31.

Lord Hale says, that by the 22 Ass. 95., which defines burglary to be a breaking of houses, churches, walls, courts, or gates, in time of peace; it seems that if a man have a wall about his house for its safeguard, and a thief in the night break the wall or the gates thereof, and finding the door of the house open enter the house; this is burglary; but otherwise if he had come over the wall of the court and

Ch. XV. § 3. *Breaking.*

found the door of the houſe open. He ſtates this doubtingly; and the book to which he refers ſeems more properly to apply to the walls or gates of a city than to a private houſe: and therefore this latter application of it never ſeems to have had any authority to ſupport it. But at any rate the diſtinction between breaking and coming over the wall or gate is very refined; for if it be part of the manſion, for the purpoſe of burglary, and be incloſed as much as the nature of the thing will admit of, it ſeems to be immaterial whether it be broken or over-leapt, and more properly to fall under the ſame conſideration as the caſe of a chimney. And if it be not part of the manſion-houſe for this purpoſe, then whether it be broken or not is equally immaterial; in neither caſe will it amount to burglary.

Vide poſt. f. 8.

Ante, 485.

§ 4. *In the inſide.* 1 Hale, 553. Sum. 81.

But though a thief enter a dwelling-houſe in the night-time through the outer door being left open, or by an open window; yet if when within the houſe he turn the key of or unlatch a chamber door with intent to commit felony, this is burglary: and ſo it was adjudged on a ſpecial verdict at Newgate 1672. The ſame was lately ruled in Johnſon's caſe by all the judges; where the priſoner entered at a back door of the houſe of William Hughes at Newington in Surry, which had been left open by the family; and afterwards broke open an inner door, and ſtole goods out of the room; and then unbolted the ſtreet door on the inſide and went out.

Rex v. Johnſon, Mich. T. 1786. MS. Buller J. & MS. Jud. *Vide* poſt. f. 6.

Sum. 82. 1 Hale, 554. Keb. 67. 4 Blac. Com. 227. Rex v. Bingloſe, O.B. 2 W. & M. MS. Denton. Serjt. Forſter's MS. Gray's caſe, 1 Stra. 481. Kel 30. S. P. 1 Hale, 554.

A ſervant lay in one part of the houſe, and his maſter in another: between them was a door at the foot of the ſtairs which was latched. The ſervant in the night drew the latch and entered the maſter's chamber in order to murder him: and held burglary. So where a ſervant opened his lady's chamber door, which was ſhut with a ſpring lock, with deſign to commit a rape.

But Lord Hale doubts whether it would be burglary in a gueſt at an inn to open *his own* chamber door, with a felonious intent; becauſe he had a ſpecial intereſt therein. And yet if another opened the gueſt's door burglariouſly, it muſt be laid to be the manſion of the innkeeper; and a gueſt may commit larceny of what is delivered to his charge.

Vide poſt. f. 15. & tit. Larceny.

§ 5. *Fixtures, &c.* Poſt. 108. Foſh. 84. Kel. 59. 69.

If the thief enter by the open door, and in the houſe break a trunk or box which was locked, this is no breaking to conſtitute

conſtitute burglary; becauſe ſuch things are no part of the houſe. Ch. XV. § 5. *Breaking.*

At a meeting of the judges upon a ſpecial verdict in January 1690, they were divided in opinion upon the queſtion, whether breaking open the door of a cupboard let into the wall of the houſe and fixed to the freehold were burglary or not. Lord Hale expreſsly ſays, that ſuch breaking is not burglary at common law; though he thinks it ſufficient to bring the caſe within the ſtat. 5 & 6 Ed. 6. c. 9. and 39 Eliz. c. 15.: founding the diſtinction upon Simpſon's caſe, where he ſtates that the breaking open of a cheſt in the houſe brought the offence within the ſtat. 39 Eliz.; which, if a moveable cheſt be meant, is denied by Mr. J. Foſter to be law; for Simpſon's caſe could not turn upon the circumſtance of breaking a cheſt or a cupboard, as in fact both the inward and outward doors were broken. With regard to cupboards, preſſes, lockers, and other fixtures of the like kind, the ſame learned Judge thinks that in favour of life there ought to be a diſtinction between caſes relative to mere property, as between the heir and executor, and ſuch wherein life is concerned. In the former the law will preſume the intention of the owner to have been to leave the houſe entire and undefaced. In the latter, ſuch fixtures which merely ſupply the place of cheſts and other ordinary houſhold utenſils ſhould be conſidered in no other light than as mere moveables partaking of the nature of thoſe utenſils, and adapted to the ſame uſes. And Lord Hale, in another paſſage, ſeems to have inclined to the ſame opinion.

MS. Denton.

1 Hale, 527.

Ib. 508. 524, 7. *Vide* 2 Hale, 358.

Foſt. 108. Kel. 31. 59. 69.

Foſt. 109.

1 Hale, 555.

§ 6. *Breaking out.*

By ſtat. 12 Ann. c. 7. ſtating the law to have been doubted, it is *declared* and enacted, "that if any perſon ſhall "enter into the manſion or dwelling-houſe of another by "day or by night, without breaking the ſame, with an "intent to commit felony; or being in ſuch houſe ſhall "commit any felony; and ſhall in the night-time break the "ſaid houſe to get out of the ſame; ſuch perſon is and ſhall "be adjudged to be guilty of burglary, and ſhall be ouſted "of the benefit of clergy in the ſame manner as if ſuch "perſon had broke and entered the ſaid houſe in the night-"time, with an intent to commit felony there."

12 Ann. c. 7. ſ. 3. Ante, ſ. 4.

This

Ch. XV. § 6. *Breaking.*

2 MS. Sum. 300. Sum. 81. MS. Tracy, 81. 1 Hale, 554. Dalt. ch. 151. ſ. 3.

This was ſaid to be law before the paſſing of the ſtatute. But it had been doubted by Lord Holt and Trevor C. J. in the caſe of Elizabeth Clarke at the O. B. in 1707, upon a ſpecial verdict found by the direction of the former; in conſequence of which the act was paſſed.

2. *There muſt be an Entry.*

§ 7. *Entry.* 1 Hale, 555. Sum. 80. 1 Hawk. ch. 38. ſ. 3. 7. Foſt. 108. 3 Inſt. 64. 1 And. 114. Crompt. Juſt. 32.

Where the houſe was broken but not entered, and the owner for fear threw out his money; it was holden to be no burglary: though clearly robbery, if taken in the preſence of the owner. But if any part of the body be within the houſe, hand or foot; this at common law is ſufficient, and has always been ſo ruled. And this Mr. Juſtice Foſter ſays would be ſufficient to bring the caſe within the ſtatutes of Edward 6th and Eliz. with regard to houſe-breaking attended with larceny in the day-time.

Rex v. George Gibbons, O. B. 1752. cor. the Ld. Ch. B. and Foſter and Birch Js. Foſt. 107.

In Gibbons's caſe, evidence that the priſoner in the night-time cut a hole in the window-ſhutters of a ſhop, part of a dwelling-houſe, and putting his hand through the hole, took out watches, &c. was holden burglary though no other entry was proved.

2 MS. Sum. 298. 1 Hale, 553. 1 Hawk. ch. 38. ſ. 4. Crompt. 32. b. Sav. 59. Ante, ſ. 2. Sum. 80. Burnet's MS. 80. 3 Inſt. 64.

Thieves came by night to rob a houſe; the owner went out and ſtruck one of them; another made a paſs with a ſword at perſons he ſaw in the entry, and in ſo doing his hand was over the threſhold; this was adjudged burglary by great advice. So putting a hook to ſteal, or a piſtol to kill, within the door or window, though the hand be not in, is an entry.

1 Hale, 555. *Vide* 1 And. 115. 1 Hawk. ch. 38. ſ. 7.

But if a man ſhoot without the window, and the bullet come in; this ſeems, ſays Lord Hale, to be no entry to make burglary; though he ſubjoins a quære. And Hawkins expreſsly conſiders the diſcharge of a loaded gun into a houſe as an entry. And indeed it ſeems difficult to make a diſtinction between this kind of implied entry, and that by means of an inſtrument introduced within the window or threſhold for the purpoſe of committing a felony; unleſs it be, that the one inſtrument by which the entry is effected is holden in the hand, and the other is diſcharged from it. No ſuch diſtinction however is any where laid down in terms: nothing further appearing than that the entry muſt be for the purpoſe of committing a felony. According to which, where thieves

had bored a hole *through* the door with a center-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the center-bit had penetrated into the house; yet as the instrument had not been introduced for the purpose of taking the property or committing any other felony, the entry was ruled incomplete. Ch. XV. § 7. *Entry*

O. B. 1785. Rex v. Hughes and others, cor. Willes J. and Hotham B. MS. S. C. 1 Leach, 452.

Also it appears from cases before mentioned, that if a person living within the walls of a mansion enter into any other apartment of the same with a felonious intent, that is a sufficient entry. Ante, f. 4.

The entry need not be at the same time as the breaking, provided both be in the night; therefore if thieves break a hole in the house one night, with intent to enter another night and commit felony, which they execute accordingly, it is burglary. 1 Hale, 551.

3. *What a Mansion.*

§ 8. *Mansion-house.*

Next is to be considered what is such a mansion-house, the breaking and entering of which may amount to burglary. There seems to be three distinct objects of burglary mentioned in the books; 1. It may be committed, as it is said, against the walls or gates of a walled town. 2. Against churches. 3. Against private dwelling-houses. Of the first it is unnecessary to say any thing; and not much of the second in this place, further than to observe, that as it is evidently of a distinct nature from the last or common species of burglary, so many of the circumstances fit to be observed of the one are inapplicable to the other. I proceed therefore 3dly, to consider of burglary as it is now understood against a private mansion or dwelling-house. And this involves two questions: 1 Hawk. ch. 38. s. 10. ch. 39. s. 17. 4 Blac. Com. 224. 3 Inst. 64. 1 Hale, 549 556. Sum. 82.

1. *What buildings are included in the term mansion or dwelling-house.*

2. *What kind of inhabitancy is necessary to constitute it such.*

§ 9. *To what the mansion extends.*

1. Every house for the dwelling and habitation of man is taken to be a mansion-house wherein burglary may be committed. Likewise a chamber or room, be it upper or lower, wherein any person inhabits or dwells, is a mansion-house in law. 3 Inst. 64, 5.

Ch. XV. § 9. *Manſion.*

law. But this latter muſt be underſtood with certain reſtrictions which will be explained as I proceed. In this ſenſe chambers in the inns of court are to be conſidered as the manſions of the ſeveral occupiers; though all under the ſame roof, and having the ſame common entrance.

1 Hale, 556. 1 Hawk. ch. 38. ſ. 13. Cro. Car. 474.

Turner's caſe, O. B. Feb. 1784. Leach, 249. (laſt edit 342) and Self. Pap. p. 390.

Thomas Turner was indicted for burglary and larceny in the dwelling-houſe of Edward Whitmead. The proſecutor was coachman to Lady Hervey, and rented two lodging-rooms, (one of which was broken open by the priſoner,) which were ſituated over the coach-houſe and ſtables, and were rated in the pariſh books as appurtenances to the coach-houſe and ſtables, and not as dwelling-houſes. The way to theſe was down a paſſage out of the public mews; and the entrance to the ſtair-caſe which lead to the rooms was through a door which was never faſtened out of the paſſage leading to the coach-houſe and ſtables. There were ſeparate doors at the top of the ſtair-caſe to each of the rooms, which were locked at night; and there were other rooms over the coach-houſe and ſtables ſituated in the ſame manner. It was contended that theſe rooms being intended as mere hay-lofts did not in contemplation of law form ſuch dwelling-houſes as to become the ſubject of burglary; but the judges upon reference to them were clearly of a different opinion: they thought the ſituation of the rooms could not alter the nature of the caſe; they were to all intents and purpoſes the habitation and domicile of the proſecutor and his family: and the priſoner had judgment for ſtealing to the value of 40 s. out of the dwelling-houſe, having been acquitted by the jury of the reſt of the charge.

Booths, &c. 1 Hawk. ch. 39. ſ. 17. 1 Hale, 557, 9. 4 Blac. Com 226. *Vide* tit. Larceny.

But no burglary can be committed by breaking into any incloſed ground, or into any booth or tent, though the owner lodge therein: but in caſe of any robbery committed in theſe latter, a remedy is provided by the ſtat. 5 & 6 Ed. 6. c. 9.

§ 10. *Outhouſes, &c.* 1 Hale, 558, 9. 1 Hawk. ch. 38. ſ. 12. Sum 82. 3 Inſt. 64, 5. 4 Blac. Com. 225. Dalt. ch. 151. ſ. 4. MS. Burnet. 82.

The manſion not only includes the dwelling-houſe, but alſo the outhouſes, ſuch as barns, ſtables, cowhouſes, dairy-houſes and the like, *if they be parcel of the meſſuage*, though they be not under the ſame roof, or joining contiguous to it. Therefore two were condemned at Cambridge in 1616 for breaking open a back houſe of Robert Caſtle's 8 or 9 yards diſtant

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distant from the dwelling-house, only a pale reaching between them. And so it was agreed by all the judges in the time of Lord Ch. J. Hyde in 1665. And it is clear that any outhouse within the curtilage or same common fence as the mansion itself must be considered as parcel of the mansion. But no distant barn, warehouse, or the like, is under the same privilege; nor indeed any out-house however near, if it be not parcel of the messuage, and so found to be.

R. v Garland, Somerset Lent Ass. 1776. MS. Gould J. *Vi. Green's case, O. B Feb Sess. 1789. cor. Thomson B. and Grose J.*

William Garland was indicted for burglary in the dwelling-house of George Shore. The jury found specially that the prisoner broke and entered in the night-time, with intent to steal, an outhouse in the possession of G. S. and occupied by him with his dwelling-house mentioned in the indictment, and separated therefrom by an open passage eight feet wide: and that the said outhouse was not connected with the said dwelling-house by any fence inclosing both. In Easter term 16 Geo. 3. the judges were of opinion that there should be judgment for the prisoner; for the jury should have found it parcel of the dwelling-house, if it were so. In that case the outhouse being so separated from the dwelling-house, and not within the same curtilage or common fence, was not therefore protected by the bare fact of its being so occupied with it at the same time.

But if the outhouses be adjoining to the dwelling-house, and occupied as parcel thereof, though there be no common inclosure or curtilage, they may still be considered as parts of the mansion. Upon an indictment for burglary in the dwelling-house of Martin Graydon, and stealing oats thereout; it appeared that the prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of building, in the order mentioned, and under one roof; but they were not inclosed by any wall or court yard, and had no communication from either to the other within. The prisoner stole the corn out of the barn at night; and after conviction, the judges upon a conference held it right; for the barn, which was under the same roof, was parcel of and enjoyed with the dwelling-house. Though there was some difficulty as to another point of the case hereafter noticed. Lord Hale puts this amongst other instances of outbuildings which he considers would be no parcel of the messuage; namely, if a man take

R. v. G. Brown, Newcastle Sum. Ass. 1787. cor. Wilson J. MS. Gould & Buller Js. *vide* post. f. 14. S. C. & *vide* Gibson's case, post. 508.

Mich. T. 1787.

1 Hale, 559.

 a lease

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a leaſe of a dwelling-houſe from A., and of a barn from B. From whence it might be inferred, that be the other circumſtances what they may, yet no outhouſe holden under a different title from the dwelling-houſe can be the ſubject of burglary. But with great deference to ſo high an authority, the circumſtance of an outbuilding being enjoyed by the occupier under a different title from his dwelling-houſe (a fact which cannot enter in any degree into the merits of the queſtion) ſeems a very unſatisfactory reaſon of itſelf for excluding it from the ſame protection, if it be within the curtilage or under the ſame roof, and actually enjoyed as parcel of the dwelling-houſe in point of fact, and under ſuch circumſtances as would apart from the difference of title conſtitute it parcel of the manſion in point of law. It may be very different where part of a dwelling is ſevered from the reſt by leaſe or otherwiſe, and in the diſtinct poſſeſſion of another, as will preſently be ſhewn.

Poſt. f. 20.

Rex v. Eggington and others, Stafford Sp. Aſſ. 1801. MS. Jud. *A manufactory carried on in the center building of a great pile, in the wings of which ſeveral perſons dwelt, but having no internal communication with the ſame, though the roofs of all were connected, and the entrances of all were out of the ſame common incloſure; held not a dwelling-houſe in which burglary could be committed.*

John Eggington and ſeveral others were indicted for burglary, and ſtealing goods in the dwelling-houſe of Mathew Robinſon Boulton. Another count laid the offence to be in the dwelling-houſe of John Buſh; and a third in that of William Nelſon. There were other counts not material to the preſent purpoſe. On the trial it appeared that Mathew Boulton (one of the perſons whoſe property was taken) was concerned in different manufactures with different perſons in whom the property taken was laid in the ſeveral counts: beſides which he carried on two other manufactories on his own ſole account. Some money and part of ſome ſilver taken were kept in a counting-houſe which was uſed for tranſacting the money concerns, and keeping the accounts of all the different buſineſſes in which M. Boulton was engaged: other part of the ſilver was in a room, being one of ſeveral, where the plate buſineſs was carried on; which rooms and counting-houſe formed a center, having two wings adjoining, conſiſting of dwelling-houſes inhabited by perſons engaged in M. Boulton's manufactories. One of them was inhabited by M. R. Boulton (mentioned in the firſt count); but that had no internal communication with the center building at the time of the offence committed; a room in his houſe, which communicated with the center building, having been allotted to the purpoſes of the plating buſineſs, with

with which he had no concern; and the door into it being shut up, and a working-bench placed against it, so as to stop the passage. One Buth (mentioned in the second count), a workman of M. Boulton's, occupied another of the dwelling-houses in the same wing; and from his house there was no way into the center building: but there was in it a window which looked into a passage, that run the whole length of the center building. In the other wing was the dwelling-house of W. Nelson, (the person thirdly named,) the partner of M. Boulton in the button business, which had no internal communication with the center: and in that wing other persons lived. In the front of this building was a terrace or front yard, fenced round in different ways, and at the end of the pile of building, above described, by a wall with gates for horses and carriages and a door for foot passengers. It appeared that the prisoners entered the premises in the night by the help of Phillips a servant of the prosecutor's employed in the manufactory, (who had privately given information of the whole to his employers,) who opened the door for them into the front yard, from whence they passed along the front of the building, and round into another yard behind it called the middle yard; and from thence they and Philips went through a door, which was left open, up a stair-case in the center building leading to the counting-house and rooms where the plating business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, forced the door, and took from thence a quantity of silver, and returned by the way they came into the middle yard, where they were immediately apprehended. The prisoners were convicted; but the case was reserved for consideration on two points. After argument in the Exchequer-chamber before all the Judges, they all agreed on the first point, that the prisoners were not guilty of the burglary. That the center building, which they had entered, and plundered, could not be considered as part of any dwelling-house; but a place for carrying on a variety of trades; and no parcel of the houses adjoining, with none of which it had any internal communication, nor was to be considered as under the same roof; though

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though the roof of it had a connection with the roofs of the houſes. But as to the ſecond point, a majority held the priſoners guilty of the larceny (*a*).

§ 11. *Inhabitantcy.* 1 Hawk. ch. 38. ſ. 11. 1 Hale, 556. Sum. 82. Kel. 52. 67. 3 Inſt. 64. 4 Blac. Com. 224, 5. Moor, 660. 4 Co. 40. Poph. 52. Foſt. 77.

2. The other point to be conſidered is relative to the *inhabitantcy*, of which there muſt be ſome token either by the preſent or at leaſt by the previous occupation of the owner or ſome part of his family, in order to make the manſion an object of this high protection of the law. However it is agreed by all, that a houſe wherein a man dwells but for part of the year, or a chamber in one of the inns of court, or of a college, wherein any perſon uſually lodges, may be called his dwelling-houſe, whether any perſon were actually therein or not at the very time of the offence. Yet in all caſes the owner muſt have quitted the houſe animo revertendi, in order to have it ſtill conſidered as his manſion, where neither he nor any part of his family were in it at the time of the breaking and entering.

Rex v. Murry & Harris, O. B. Eaſt. 10 W 3. MS. and MS. Denton and Chapple Foſt. 77. and Serjt. Forſter's MS.

John Nicholls being poſſeſſed of a houſe in Weſtminſter wherein he dwelt, took a journey into Cornwal, with intent to return, and ſent his wife and family out of town, and left the key with a friend to look after the houſe: after he had been gone a month, no perſon being in the houſe, it was broke open in the night and robbed of divers goods. He returned a month after with his family and inhabited there. And adjudged burglary by Holt C. J., Treby J., and four other Judges.

Nutbrown's caſe, O. B. 1750. Foſt. 76.

John and Miles Nutbrown were indicted for burglary in the dwelling-houſe of one Mr. Fakney at Hackney, and ſtealing divers goods. The proſecutor made uſe of it as a country houſe in the ſummer, his chief reſidence being in London. About the latter end of the ſummer preceding the offence, he removed with his whole family to his houſe in the city, and brought away a conſiderable part of his goods. And in the November following the houſe at Hackney was broken open and in part rifled; upon which he removed the remainder of his houſehold furniture, except a clock and a few old bedſteads and ſome lumber of little value, leaving no bed or kitchen furniture or any thing elſe for the accommodation of a family. Mr. Fakney, being aſked whether at the time he ſo diſfurniſhed his houſe he

(*a*) *Vide* S. C. at large on this point, tit. Larceny.

had

had any intention of returning to reſide there, declared that he had not come to any ſettled reſolution whether to return or not; but was rather inclined totally to quit the houſe, and to let it for the remainder of his term. The fact of the burglary happened in the January following. But the court were of opinion, that the proſecutor having left his houſe, and diſfurniſhed it in the manner before mentioned, without any ſettled reſolution of returning, but rather inclining to the contrary, it could not be deemed his dwelling-houſe at the time the fact was committed: and accordingly the priſoners were directed to be acquitted of the burglary; but they were found guilty of the ſtealing.

Ch XV. § 11. *Manſion-inhabitancy.*

If a man hire a ſhop in which he or his ſervant uſually or often lodge, burglary may be therein committed: but generally ſpeaking it ſeems that a mere caſual uſe of a tenement as a lodging, or only upon ſome particular occaſions, will not conſtitute it a dwelling-houſe for this purpoſe. In Brown's caſe all the Judges agreed that the fact of a ſervant having ſlept in a barn the night it was broken open and for ſeveral nights before, being put there for the purpoſe of watching againſt thieves, made no ſort of difference in the queſtion whether burglary or not. So a porter lying in a warehouſe *to watch goods*, which is only for a particular purpoſe, does not make it a dwelling-houſe: but if all communication with the dwelling-houſe of which it is a part be not excluded, it may ſtill be a part of the houſe in which burglary may be committed.

1 Hale, 557, 8.

Brown's caſe, poſt, f. 14.

R. v. Smith, M. 3 G. 1 by 10 Judges, Lord King's MS. 96. Serjt. Forſter's MS.

§ 12. *Taking poſſeſſion.* 1 Hawk. ch. 38. f. 21.

Serjt. Hawkins ſtates generally, that burglary may be committed in a houſe which one has hired to live in and brought part of his goods into, but has not yet lodged in: but he cites no authority to that effect except a paſſage in Kelyng 46. to which there is a quære ſubjoined. And this point has often ſince been ruled otherwiſe.

Rex v. Lyons and Miller, O. B. Jan. 1778. Crown Caſ. Ref. MS. & MS. Gould & Buller Js. *vide* Leach, 169. (new edit. 221.) where it is ſaid there were ſome goods in the houſe.

Lyon Lyons and Thomas Miller were indicted for burglary in the dwelling-houſe of Edward Smith, with intent to ſteal, &c. But it appearing that the houſe was left to the care of a carpenter, who was to put it into repair; and that the proſecutor had never inhabited it, nor had ſervants or furniture in it; and that the former occupier had removed out of it about a fortnight; and it was at the time of the of-

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fence committed uninhabited; it was objected for the priſoners that the houſe was not in judgment of law the dwelling-houſe of Edward Smith. And after conviction, upon

East. term 1778. reference to the Judges, they held that this was no manſion-houſe, having never been inhabited by Smith. They were alſo of opinion that it was not burglary upon this indictment; for there were no goods in the houſe: and the indictment (charging the intent to ſteal) muſt be to ſteal the goods *then and there being;* and where nothing was in the houſe nothing

MS. Gould J. could be ſtolen. Alſo it ſeemed to be the ſenſe of the Judges; and Eyre B. declared it to be his opinion, that although ſome goods might have been put into the houſe, which is the caſe put in Kelyng 46., and there doubted; yet if neither the party nor any of his family had inhabited it, it would not be a manſion-houſe in which burglary could be committed.

Hallard's caſe, Exeter Sp Aſſ. 1796. cor. Buller J. MS.

The former tenant of a houſe had quitted it, and the incoming tenant had put in all his furniture, and had been frequently there in the day-time; but had never ſlept in the houſe, nor any of his family. Buller J. held that burglary could not be committed therein. And the like caſe was ruled by Groſe J. at the ſame period on the home circuit.

Thompſon's caſe, Kingſton Sp. Aſſ. 1796. 2 Leach, 893. Fuller's caſe, O. B. Dec. 1782. Leach, 169. n. (laſt edit 222.)

William Fuller being indicted for a burglary in the dwelling-houſe of Mr. Holland; it appeared that the houſe was a new one, and finiſhed all but the painting and glazing; that a workman who was conſtantly employed by Mr. Holland ſlept in it for the purpoſe of protection; but no part of Mr. Holland's domeſtic family had yet taken poſſeſſion of it. This was ruled by the Recorder, on the authority of Lyons' caſe, not to be the manſion-houſe of the proſecutor.

Harris's caſe, O. B. Oct 1795. 2 Leach, 868.

On an indictment againſt John Harris for burglary in the dwelling-houſe of H. W. Dinſdale, it appeared that the proſecutor had lately taken the houſe near Cheapſide, and on the night of the offence and for ſix nights before had procured two hair-dreſſers, none of his own family, to ſleep there, for the purpoſe of taking care of his goods and merchandize therein depoſited; but he himſelf had never ſlept there, nor any of his family. The Recorder ruled that the priſoner could not be convicted of the burglary.

Conſonant to theſe authorities another caſe was lately ruled upon a ſimilar ſubject, which, though apparently it goes further than the reſt, yet in truth proceeds upon the ſame principle.

The

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The priſoner was tried upon an indictment for ſtealing goods to the value of 40s. the property of Thomas Pearce *in his dwelling-houſe.* The houſe was a public houſe in Palace Yard, of which Pearce was the owner. About a month or ſix weeks before the felony was committed, the tenant, who had carried on the buſineſs there, gave up the poſſeſſion to the proſecutor, who alſo purchaſed the furniture of him. The proſecutor reſided in Milbank, where he carried on his buſineſs of a brewer; and never intended perſonally to reſide in the public houſe, or to have the buſineſs of that houſe carried on upon his account; neither did any perſon inhabit his houſe in the day-time; but a ſervant of the proſecutor's had ſlept there conſtantly for about three weeks, ſolely for the purpoſe of protecting the furniture, till a tenant could be procured for the houſe. The priſoner was found guilty of the offence as charged in the indictment; but the queſtion was reſerved for the opinion of the Judges, whether by ſuch occupation of the houſe by Pearce in the manner above ſtated it became his *dwelling-houſe*, within the meaning of the ſtatute, ſo as to ſubject the priſoner to the capital part of the charge. In Trinity term 1800, the Judges held the conviction, as to the capital part of it, wrong; being of opinion, that as the maſter never intended to inhabit the houſe, it was not within the ſtatute; and that it would have been no burglary if the houſe had been broken in the night. The priſoner was therefore recommended to mercy on condition of tranſportation, which would have been his puniſhment if the verdict had been properly taken.

Rex v. John Davis, alias Silk, O. B. 1800. MS. Jud. *The owner of a houſe puts a perſon into it to ſleep there at nights till he can get a tenant, in order to protect ſome furniture there which he had purchaſed of the laſt tenant, which ſervant had ſo ſlept there for three weeks before; but the owner never intended to inhabit it himſelf: wherefore a conviction for ſtealing the goods* in the dwelling-houſe *of ſuch owner to the value of 40s. was holden wrong, as to the capital part of the charge, within the ſtat.* 12 *Ann. c.* 7.

A. died in his houſe; B. his executor put ſervants into it, who lodged in it and were at board wages; but B. never lodged there himſelf. Upon an indictment for burglary the queſtion was, whether this might be called the manſion-houſe of B.? The court inclined to think it might, *becauſe the ſervants lived there:* but upon the evidence there appeared no breach of the houſe.

Rex v. Jones and Longman, O. B. 1689. Chapple's MS. 2 MS. Sum. 305.

4. *As to the Owner.*

§ 13. *In whoſe manſion.* Poſt. i. 24.

It is neceſſary to aſcertain to whom the manſion belongs, and to ſtate that with accuracy in the indictment. And here it is to be lamented that the ſame rule does not prevail

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in this caſe as in arſon, which is conſidered as an offence againſt the actual poſſeſſor by whatever title he may hold the poſſeſſion. But in burglary the rule is much more complex; the ownerſhip being neither referable altogether to the legal title, nor to the poſſeſſion, but partaking ſometimes of one ſometimes of the other, as well as of both. If the rule by which to aſcertain this ownerſhip may be compreſſed with ſufficient diſcrimination into a ſmall compaſs, I ſhould ſay generally, that where the legal title to the whole manſion remains in the ſame perſon; there, if he inhabit it either by himſelf, his family, or ſervants, or even by his gueſts, the indictment muſt lay the offence to be committed againſt *his* manſion. And ſo it is though he let out apartments to inmates, who have a ſeparate intereſt therein, if they have the ſame outer door or entrance into the manſion in common with himſelf. But if diſtinct families be in the excluſive occupation of the houſe, and have their ordinary reſidence or domicile there, without any interference on the part of the proper owner; or if they be only in poſſeſſion of parts of the houſe as inmates to the owner, and have a diſtinct and ſeparate entrance; then the offence of breaking, &c. their ſeparate apartments muſt be laid to be done againſt the manſion-houſe of ſuch occupiers reſpectively. How far theſe general obſervations are well founded will beſt be ſeen by referring to the caſes themſelves from whence they have been drawn: and theſe may be conſidered in two points of view; as pointing out,

General rule.

1. *What ſhall be ſaid to be an occupation or inhabiting ſuo jure, to make it the manſion of the party.*
2. *Where a ſeverance of occupation in the ſame manſion ſhall conſtitute ſo many diſtinct manſions in law.*

§ 14. *What an occupation ſuo jure.* 1 Hawk. ch. 38. ſ. 13, 14. *By ſervants.* 1 Hale, 522 557. Kel. 27.

1. If a perſon inhabit a dwelling-houſe, as the wife, gueſt, ſervant, or part of the family of another, it is the occupation in law of ſuch other perſon, and muſt be ſo laid to be in the indictment. This rule holds with reſpect to all perſons ſtanding in the relation of ſervants. Thus apartments in the king's palaces, or in the houſes of noblemen for their ſtewards and chief ſervants, can only be laid to be the manſion-houſe of the king or nobleman; as was long ago adjudged in the inſtances of Somerſet Houſe, and Whitehall and more re-

cently in that of Chelsea Hospital; for in all these cases the occupation of the actual inhabitants is not in their own right, but as servants, or in the nature of such, representing their master: and therefore their occupation is that of the lord or proprietor of the whole mansion.

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Chelsea Hospital or Peyton's case, O.B. May 1784. 1 Leach, 364.

At the sessions at the Old Bailey before Easter term 1704, Ann Hawkins was indicted for burglary in the mansion-house of Samuel Story: and upon the evidence it appeared that it was the house of the African company, and that Story was an officer of the company, and had separate apartments, and lodged and inhabited there. Whereupon it was ruled by Holt C. J., Tracy J., and Baron Bury, that Story's apartments could not be said to be his mansion-house, because he and others in similar situations inhabited them only as officers of the company: and for this the jury were discharged of this indictment; and it was laid as the mansion-house of the company. For though an aggregate corporate body cannot be said to inhabit any where, yet they may have a mansion-house for the habitation of their servants.

Ann Hawkins's case, O. B. 1704. MS. Tracy 82. Foft. 38. *Burglary in the apartments of officers of a public company must be laid to be in the mansion-house of such company.*

John Picket was indicted for burglary, and stealing bullion in the dwelling-house of the East-India company, which is inhabited by their servants; and was convicted and executed.

Picket's case, O B. April 1765. Serjt. Forster's MS.

Maynard was indicted for burglary and felony in breaking and entering the mansion-house of the master, fellows, and scholars of Bennet College in Cambridge. The fact was, that he broke into the buttery of the college, and there stole some money: and it was agreed by all the Judges, upon reference to them, that it was burglary.

Charles Maynard's case, Cambridge Lent Aff 1774. Serjt. Forster's MS.

George Brown was indicted for burglary in the dwelling-house of Martin Graydon, and stealing thereout oats. A 2d count stated it to be the dwelling-house of Thomas Trumball. Graydon who was a farmer had a dwelling-house in which he lived, a stable, cow-house, cottage, and barn, all in one range of buildings in the order mentioned, and under one roof: but they were not inclosed by any wall or court-yard, and had no communication from either to the other within. Trumball's family resided in the cottage by agreement with Graydon when he went into his service; but Trumball paid no rent; only an abatement was made in his wages on account of his family being to reside in the cot-

Brown's case, Newcastle Sum. Aff 1787. cor. Wilson J. MS. Gould & Buller Js. & MS. Jud. ante, f. 10. S.C. for another point.

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tage. Some corn having been missed out of the barn, Trumball and another person put a bed in the barn, and went and slept there, and on the fourth night after they had so done the prisoner unlocked the barn door and took away a quantity of oats. After conviction, judgment was respited upon a doubt whether it could be considered as the dwelling-house either of Graydon or Trumball. Upon a conference in Michaelmas term 1787, it was agreed by all the Judges that the sleeping in the barn made no difference. But they held (Buller J. doubting) that this was no more than a licence to Trumball the servant to lodge in the cottage, and not a letting of it to him. And that the barn as well as the rest of the buildings, being under the same roof, continued parts of the mansion-house of Graydon. And many of the Judges inclined that if there had been a demise to Trumball of the cottage, the barn would still have continued part of Graydon's dwelling-house in point of law.

MS. Gould J.

§ 15. *Guests.*

1 Hale, 554 557. 2 MS. Sum. 305

By the same rule, if the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper. It is indeed said in Dalton, c. 151. s. 4. that if the host of an inn break the chamber of his guest in the night to rob him, it is burglary. But this may justly be questioned: and there seems no distinction between that case and the case of an owner residing in the same house breaking the chamber of an inmate having the same outer door as himself; which Kelyng says cannot be burglary.

Kel. 84.

Abel Proffer's case, Monmouth Sum. Ass 1768. 2 MS. Sum. 306. *One under pretence of being robbed forces the door of a guest's chamber in an inn in the night, and steals his goods; held, the burglary must be laid to be in the dwelling-house of the innkeeper, and not of the guest.*

Abel Proffer was indicted for burglariously breaking, &c. the house of Nathan Levy, and stealing his property there. The prosecutor, a Jew pedlar, came to the house of one Lewis a publican to stay all night, and fastened the door of his bed-chamber. The prisoner pretended to Lewis the landlord that the prosecutor had stolen his goods; and under this pretence he with the assistance of Lewis and others forced the chamber door open with intent to steal the goods mentioned in the indictment, and the prisoner accordingly stole them. These facts were found specially. Mr. Baron Adams, who tried the prisoner, doubted whether the bed-chamber could properly be called the dwelling-house of the prosecutor as described in the indictment, being truly a part of

of the dwelling-houſe of Lewis the innkeeper: he therefore reſerved the point for the opinion of the reſt of the Judges. And they all thought that though the proſecutor had for that night a ſpecial intereſt in the bed-chamber, yet it was merely for a particular purpoſe, namely, to ſleep there that night as a travelling gueſt, and not as a regular lodger. That he had no certain and permanent intereſt in the room itſelf; but both the property and the poſſeſſion of the room remained in the landlord, who would be anſwerable civiliter for any goods of his gueſt that were ſtolen in that room, even for the goods now in queſtion; which he could not be unleſs that room were deemed to be in his poſſeſſion. That the landlord might go into the room when he pleaſed, and would be no treſpaſſer to the gueſt. Upon the whole, that this indictment was inſufficient. Lord Hale puts this caſe: If A. be a lodger in an inn, and in the night he open the latch of his chamber door, and ſteal goods in the houſe and go away; it may be a queſtion whether this be burglary? and, ſays the learned author, it ſeems not, becauſe he had a kind of ſpecial intereſt in his chamber, and ſo the opening of his own door was no breaking of the innkeeper's houſe: but he admits, that if A. had opened the chamber of another lodger in the inn, to ſteal his goods, that had been burglary. Now if the reaſoning in the above caſe of Proſſer be juſt and well founded; namely, that a gueſt has not even the poſſeſſion of a room in an inn for himſelf, but it remains ſtill in the poſſeſſion of the hoſt; that reaſoning will bear very hard againſt the diſtinction which Lord Hale inclines to adopt in the above paſſage: and then the caſe of a gueſt in an inn breaking his own door to ſteal goods in the night will fall under the ſame conſideration as a ſervant under the like circumſtances: and this deſerves to be well weighed before any final reſolution upon the point.

Ch XV. § 15. *In whoſe manſion.*

1 Hale, 554. 4 Blac. Com. 227.

(Kel. 69.)

Vide ante. f. 4.

Vide Gowen's caſe, Mich 1786. tit. Arſon.

§ 16. *By wife or family.*

As the poſſeſſion of the ſervant or gueſt is the poſſeſſion of the owner, ſo is the poſſeſſion of any who in law are deemed to be part of the owner's family. Farre's caſe is very ſtrong to this effect; where it was holden, that if the houſe of a feme covert who lives apart from her huſband be broken, though the huſband had expreſsly refuſed to have any thing to do with the leaſe, and the landlord had thereupon agreed

Farre's caſe, Kel. 43.

Ch. XV. § 16. *In whose mansion.*

with the wife alone, yet it must be laid to be the house of the husband. But it seems to follow as a matter of course, that in any case where the law would adjudge the separate property of the mansion to be in the wife, and she has also the exclusive possession, the burglary ought to be laid against her mansion-house, and not against that of her husband.

§ 17. *Several tenements in the same house.*

2. *What severance of occupation in the same house will constitute so many several mansions in law?*

This is evidently the case where there is an actual severance in fact by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants.

Jones's case, O. B. Sept. 1796, cor. Ld. C. B. Eyre & Gould J. Leach, 434. (new edit. 607.) *Several occupations of distinct parts of the same house, though by partners having a joint property therein, and paying the rent and taxes for the whole out of the joint stock, make several mansions.*

Martha Jones was indicted for burglary and larceny in the dwelling-house of Thomas Smith and John Knowles. The prosecutors were in partnership, and lived next door to each other. The two houses, which were formerly one, had been divided for the purpose of accommodating their respective families, and were then perfectly distinct and separated from each other, without any communication but by the street. The housekeeping was paid by each partner respectively for his own house; but the rent and taxes of both houses were paid jointly out of the partnership fund. The offence was committed in the house of Smith, to whom the prisoner was servant. It was objected, that although these two houses were the joint property of both the partners, yet they were the several and respective mansions of each; and therefore the offence ought to have been laid as committed in the house of Smith only. And the court, considering the objection to be well founded, directed the jury to acquit the prisoner of the capital part of the charge; and she was found guilty of the simple larceny only.

Tracy v. Talbot, Trin. 2 Ann. at Ni. Pri. Salk. 332.

In Tracy v. Talbot, Lord Holt was of opinion that if two several houses are inhabited by two several families who make or have but one common avenue or entrance for both; yet in respect of their original both houses continue rateable separately; and if one family go, one house is vacant. But if one tenement be divided by a partition, and inhabited by different families, viz. the owner in one, and a stranger in another; these are several tenements, severally rateable, while

while they are thus severally inhabited; but if the stranger and his family go away, it becomes one tenement again. Ch. XV. § 17. *In whose mansion.*

With respect to the case of chambers in the inns of court, which have been before noticed in another view, they are to all purposes considered as distinct dwelling houses: and therefore whether the owner happen to enter at the same common outer door or not will make no manner of difference. The sets are often held under distinct titles, and are in their nature and manner of occupation as unconnected with each other as if they were under separate roofs. Ante, f. 9. Tracy's MS. 83. Evans v. Finch, Cro. Car 473. W. Jones, 394. 1 Hale, 522, 3. 556. 1 Hawk. ch. 38. f. 11.

§ 18. *Inmates.*

Much doubt has formerly been entertained whether in the case of burglary in the hired apartment of an inmate, it shall be laid to be committed in the mansion of the inmate or of the owner. Lord Hale was of the former opinion; which is also argued for very elaborately by Hawkins, at least where the party has a fixed and certain interest in his apartment. As where one hires a distinct apartment in the house for his lodging for a certain time, though he enter at the same door with the other inhabitants, and therefore is but an inmate: because as long as it is severed by the lease, it is in the eye of the law as distinct from the other parts of the house, as if the person who rented it had a freehold or inheritance in it. This opinion of Hawkins is delivered generally, without reference to the distinction of the owner's residing or not in the same mansion. But his reasoning evidently tends to exclude any such distinction. But however convenient such a rule might have been, it certainly does not coincide with the current of authorities either ancient or modern. For the rule is now taken to be, according to the opinion of Kelyng, that if the owner, who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer doors, the apartments so let out are the mansion for the time being of each lodger respectively. And accordingly it was so ruled by Holt C. J. at the Old Bailey in 1701; although in that case the rooms were let for a year under a rent. And Tanner an ancient clerk of the court said, 1 Hale, 556. 1 Hawk. ch. 38. s. 13, 14. Kel. 84. 4 Blac. Com. 225. Lee v. Gansell, Cowp. 1. MS. Tracy, 83.

Ch. XV. § 18. *In whose manſion. Inmates.*

ſaid, that the conſtant opinion and practice of the court had been according to the opinion of Kelyng C. J., which opinion was cited by Lord Holt.

Carrell's caſe, O. B. Feb. 1782. MS. Gould and Buller Js. *Vi.* 1 Leach, 273. S. C. n. a. *Where an inmate had two rooms, one in which he ſlept, and the other up ſtairs; held burglary in the latter muſt be laid in his manſion; the owner retaining no part of the houſe.* (Eyre B. & Buller J.) Rogers's caſe, *infra.*

Richard Carrell was indicted for burglary in the dwelling-houſe of John Jordan. The houſe in which the offence was committed belonged to one Naſh, who did not live in any part of it himſelf, but let the whole of it out in ſeparate lodgings from week to week. Jordan had two apartments in the houſe, a ſleeping room up one pair of ſtairs and a work-ſhop in the garret, which he rented by the week as tenant at will to Naſh. The workſhop was the room broken open by the priſoner. In Eaſter term 1782 ten Judges againſt two held the offence well laid, and relied on the caſe of Rogers. The two Judges thought that it was not the manſion-houſe of Jordan, but that it might have been laid to have been the manſion-houſe of Naſh: to which ſome of the others inclined if it were not the manſion of Jordan.

Trapſhaw's caſe, O. B. Aug. 1786, and Hil. term 1787. MS. Jud. Leach, 333. S. C. (new edit. 478.)

In Trapſhaw's caſe the facts were exactly the ſame as in Carrell's caſe: the owner let the houſe out to different lodgers, who had but one common outer door. The proſecutor Linney rented and occupied a room on the firſt floor, where he ſlept, and a parlour below, which latter was broken open and rifled by the priſoner. All the Judges, upon the authority of Carrell's caſe and Rogers's caſe, held that the indictment (which was on the ſtat. & 4 W. & M. c. 9.) well laid the robbery to be in the dwelling-houſe of Linney, and that the conviction was proper.

Kel. 84 MS. Tracy, 82.

Hence it follows, that if a man let out part of his houſe to inmates, and continue to inhabit the reſt himſelf; if he break open the apartments of ſuch inmates, and ſteal their goods, it is felony only, and not burglary; for it cannot be burglary to break open his own houſe.

§ 19. *Occupation of owner without inhabiting.*

But a mere occupation of ſome part of the manſion by the owner, without inhabiting the ſame, makes no difference in the queſtion of burglary with reſpect to tenants or inmates.

Rogers's caſe, M. 13 G. 3. MS. Gould and Buller Js. Leach, 84 S. C. (new edit. 104.)

William Rogers was indicted at the Old Bailey for burglary in the dwelling-houſe of Philip Chandler. It appeared that the owner let the whole of it in apartments to different perſons, and did not inhabit any part of it himſelf. Chandler rented the bottom part of the houſe, conſiſting of a ſhop and a parlour and a cellar underneath; but the owner had taken

taken back the cellar for the purpose of keeping wood and lumber in it, deducting so much for it out of the rent. There was but one common outer door from the street, which communicated with the rest of the house as well as the shop and parlour in which the burglary was committed. Nine Judges present all agreed that the indictment properly laid the shop and parlour to be the mansion-house of the prosecutor; for that though the owner occupied the cellar, yet as he did not inhabit any part of the house, it could not be laid to be his dwelling-house; though if he had it would have been otherwise.

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§ 20. *Severance by lease.*

But there may be such a severance by lease of part of a mansion as that it shall no longer be the subject of burglary.

If A. have a shop which is parcel of his house, the indictment must be for breaking the mansion-house of A.; but if it be severed by lease, and have no communication with the dwelling-house, by having a different entrance; then unless the lessee or his servant sleep there usually or often, no burglary can be committed in it. For it is not the mansion-house of A., being severed by the lease; nor can it be said to be the mansion-house of the lessee, if neither he nor his family ever dwell there, or if their sleeping there be only casual or temporary.

Burnet's MS. 83. 1 Hale, 557, 8. Kel. 83, 4. 4 Blac. Com. 225, 6. 1 Hawk. ch. 38. s. 16.

Kelyng has put the case of a man having a dwelling-house, who lets a cellar and a chamber in the house to J. S., reserving the rest of his house for his own dwelling; and the only passage to the cellar is out of a street; and if the cellar be broken open in the night, whether it be burglary? And he thinks not, because it was severed by the lease, and had no communication with the rest of the house. But this may well be questioned; for the cellar which was before parcel of the house is no more severed by the lease therefrom than the chamber which was also let to J. S.; and Kelyng admits that if the chamber were broken open it would be burglary, and should be laid to be the mansion of the owner; there being but one common entrance to him and the lodger. But if the cellar alone had been let, then clearly no burglary could have been committed in it. And this distinction seems fully to have been adopted in a late case of Gibson

Kel. 83, 4.

and

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and others; who were indicted and convicted of a burglary in the dwelling-houſe of Thomas Smith, and ſtealing the goods of John Hill. Smith was the owner of a houſe at Eſher, in which he reſided, and to which houſe there was a ſhop adjoining built cloſe to the houſe; but there was no internal communication between the houſe and the ſhop; and no perſon lay in the ſhop; and the only door to the ſhop was in the court-yard before the houſe and the ſhop, which yard was incloſed by a brick wall 3 feet high, including both the houſe and ſhop. Smith let the ſhop together with ſome apartments in the houſe to John Hill from year to year at a rent. There was only one common door to the houſe, which communicated as well to Smith's as to Hill's apartments. A gate or wicket faſtened by a latch in the wall of the court-yard next the road ſerved as a communication both to the houſe and ſhop. The burglary was committed in the ſhop. And upon objection that that could not be ſaid to be the dwelling-houſe of Smith, the point was referred to the Judges, who in Eaſter term 1785 were all of opinion that the indictment was well laid in deſcribing it to be the dwelling-houſe of Smith, who inhabited in one part; and there being but one outer door; eſpecially as it was within one curtilage or fence: and that the ſhop being let with a part of the houſe inhabited by Hill, ſtill continued to be part of the dwelling-houſe of Smith, although there were no internal communication between them. But it was admitted that if the ſhop had been let by itſelf, Hill not dwelling therein, burglary could not have been committed in it, for then it would have been ſevered from the houſe.

Rex v. Gibſon and others, Kingſton Lent Aſſ. 1785. MS. Gould and Buller Js. 1 Leach, 396. S. C.

5. *In the night.*

§ 21. *Night.*

The breaking and entering muſt be in the night; though they need not be both in the ſame night: for if thieves break a hole in the houſe one night, to the intent to enter another night, and commit felony, and they accordingly do ſo through the hole they ſo made the night before, this ſeems to be burglary; for the breaking and entering were both in the night; and, ſays Lord Hale, it ſhall be ſuppoſed, *that they broke and entered in the night when they entered;* for the breaking makes not the burglary till the entry. If this were the true legal ſuppoſition, which however by no means ſeems neceſſary to conſtitute that caſe burglary, it might have been applied

1 Hale, 551, 5. MS. Burnet, 82. 4 Blac. Com. 224, 6.

applied not improperly to the case before put by the same author where the breaking was in the day-time, and the entering at night; which he says will not be burglary, upon the authority of Crompton from 8 Ed. 2.; though it is observable that the resolution there only was, that if thieves enter in by night at an hole in the wall which was there before, it is not burglary: but it does not appear who made the hole, much less that it was made by the thieves themselves with intent to enter more securely at night. As to what shall be accounted night for this purpose; anciently the day was accounted to begin only from sun-rising, and to end immediately upon sun-set: but it is now generally agreed, that if there be day-light enough begun or left either by the light of the sun or twilight, whereby the countenance of a person may be reasonably discerned, it is no burglary: but that this does not extend to moon-light; for then many midnight burglaries would go unpunished. And besides, the malignity of the offence does not so properly arise, as Mr. Justice Blackstone observes, from its being done in the dark, as at the dead of night, when all the creation except beasts of prey are at rest, when sleep has disarmed the owner, and rendered his castle defenceless.

Ch. XV. § 21. *In the night.*

Crompton, 33. a.

4 Blac. Com. 224. 1 Hale, 550. Sum. 79. 3 Inst. 63. 1 Hawk. ch. 38. s. 2. 1 Bac. Abr. 541.

6. *As to the intent.*

§ 22.

The breaking and entry of the mansion in the night must be with intent to commit some felony therein, as murder, larceny, &c., whether the felonious intent be executed or not. For if the intention of the entry be either laid in the indictment or appear upon the evidence to be only to commit some trespass, as to beat any person in the house, it will not be burglary; and this although killing or murder may be the consequence of such beating. For though in case of homicide, if one premeditately intend to beat another very severely, and execute his purpose in such a manner as must necessarily breed danger, and death ensue in consequence, though beyond his original intent; he shall be said in law to have intended all the consequences, and therefore to have intended the felony; yet that intention is a deduction in law from the felonious act, and may be supposed to originate subsequent to the first purpose in the heat of blood consequent upon the execution of it. But in burglary it must be found that the entry was for a felonious purpose; though

1 Hale, 559. 561. 3 Inst. 65. Kel. 67. 1 Bac. Abr. 543. Hutt. 20. 1 And. 115. 1 Hawk. ch. 38. s. 18. 4 Blac. Com. 228. Staund. 30. Sum. 79.

Vide Kel. 47.

Ch. XV. § 22. *Intent.*

though if a felony be actually committed, that is primâ facie pregnant evidence of such an intent, unless the contrary appear.

Easter Sess. 1687. per Wright, Herbert, Atkins, Powell, & Holt. 1 Show. 53.

A servant who was entrusted by his master sells goods and conceals the money in the house; and after he is discharged from the service, breaks the house, and takes the money which he had concealed. This was holden to be no burglary, because the first taking of the money was not felony.

Rex v. Knight and Roffey, MS. Gould & Buller Js. & MS. Jud. *Breaking and entering a house in the night-time to recover tea which had been seized; held no burglary, being intended for the benefit of the supposed owner. Qu. If the indictment had laid the intent to be to rescue the goods seized, which is made felony by statute.*

The prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of Mary Snelling at East Grinstead in the night of the 14th November 1781, with intent to steal the goods of Leonard Hawkins, then and there being in the said dwelling-house. It appeared that L. Hawkins, being an excise officer, had seized 17 bags of tea on the same month at a Mrs. Tilt's, in a shop entered in the name of Smith, as being there without a legal permit, and had removed the same to Mrs. Snelling's at East Grinstead, where Hawkins lodged. The tea the witnesses said they supposed to belong to Smith: and that on the night of the 14th November the prisoners and divers other persons broke open the house of Mary Snelling with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses swore that they supposed the fact was committed either in company with or by the procurement of Smith. The jury were directed to find the prisoners guilty, on the point being reserved: and being also directed to find as a fact with what intent the prisoners broke and entered the house; they found that they intended to take the goods on the behalf of Smith. In Easter term following all the Judges held that the indictment was not supported; there being no intention to steal, however outrageous the behaviour of the prisoners was in thus endeavouring to get back the goods for Smith. But if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., that being made felony by the stat. 19 G. 2. c. 34. the Chief Baron and some of the other Judges held that it would have been burglary. But even in that case it was agreed that some evidence must be given on the part of the prosecutor to shew that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid: but being found in oil-cases or in great

East. term, 22 G. 3. 1782.

great quantities in an unentered place would have been sufficient for that purpose. Ch. XV. § 22. *Intent.*

The above opinion is in opposition to what was formerly supposed by some, that the felony intended must be of such a fact as was felony at common law, and not such as was since made so by statute; and Lord Hale inclines to that opinion. And therefore, says he, it has been doubted whether the breaking of a house in the night with intent to commit a rape be burglary or not. Crompton thinking it is not, because made felony by stat. Westm. 2. c. 34.; and Dalton thinking it would be burglary, because rape was felony by the common law; which Lord Hale thinks the more warrantable opinion. And indeed the matter is since put out of all doubt in regard to the particular case of rape, by the case of the King v. Locost and Villers, and the King v. Gray; wherein it was clearly holden that the breaking, &c. the house with such an intent was burglary. But still the general point remained in the same doubt as before: for rape was established to be felony at common law. Hawkins however, and after him Mr. Justice Blackstone, carry the rule further; and though the former seems to found himself chiefly upon the mistaken notion that rape was only made felony by statute, yet the reason assigned by both is general: and according to them it makes no difference whether the offence intended were felony at common law, or only created so by statute; *because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.* And it has been shewn before in the case of Knight, that the same reasoning was adopted by several of the Judges, though the point was not immediately before them in judgment.

What felony.

1 Hale, 562.

Crompton, 32. Dalt. ch. 151. s. 5. Staundf. 81.

R. v. Locost and Villers, O. B. 1664. Kel. 30. Rex v. Gray, 1 Stra. 481. ante, 488.

1 Hawk. ch. 38. s. 19. 4 Blac. Com. 228.

Ante, 510. *Vide* R. v. Wells, East. term 1786. Ante, 414. post. Indictment.

Trial.

I do not find any thing worthy of special notice in regard to the trial of burglaries in general; it is governed by the ordinary rules which prevail in cases of felony. But I shall hereafter have occasion to refer to the stats. 25 Hen. 8. c. 3. and 5 & 6 Ed. 6. c. 10. with respect to the trial and punishment of those who are taken with goods in one county, which were obtained by burglary in another: and also to the stat. 10 Geo. 3. c. 48. concerning the receivers of certain goods obtained in the same manner.

§ 23. *Trial.*

Vi. tit. Larceny.

§ 24. *Indictment, &c.* 1 Hale, 549. 1 Hawk. ch 38. per tot.

The indictment for burglary may run thus: that J. S. on such a day, in the night of the same day, with force and arms, the dwelling-house of A. B. feloniously and burglariously broke and entered, and then and there such and such things of the goods and chattels of the same A. B., in the same house then being, feloniously and burglariously did steal, take, and carry away; or, if no theft were actually committed, then, with intent the goods and chattels of the said A. B., in the same house then being, feloniously and burglariously to steal, take, and carry away; or, with intent the said A. B. there feloniously to kill, &c.; or both the felonious intent and the actual felony may be charged.

1 Hale, 550. 4 Co. 39. b. 5 Co. 121. b.

The offence must not only be laid to be done feloniously, but also *burglariously;* which is a term of art, and cannot be expressed by any other word or circumlocution.

Breaking and entering. Ante, f. 2. 7. 1 Hale, 550.

It must be stated that the offender *broke* and *entered* the house; a breaking without an entry, or vice versâ, is insufficient.

Mansion. 1 Hale, 550. c 56. 1 Hawk. ch. 38. f. 10. 4 Blac. Com. 224, 5.

It must be laid to be done in a mansion or dwelling-house; and therefore if it be only said to be in the *house* of such an one, it is not sufficient. But this rule extends only to the case of burglary in a private house; for if, as has been hinted before, the offence may be committed by breaking open a church, or the gates or walls of a town, it seems agreed to be more proper to lay the indictment according to the truth of the fact; and therefore stating that the prisoner feloniously and burglariously broke and entered, &c. the parish church of D., &c. is sufficient. Where the burglary is in any out-house, which by law is considered part of the dwelling-house, it must still be laid to be done in the dwelling-house; or at least, as in Dobbs's case after mentioned, in the stable, &c. alleging it to be part of the dwelling-house: and in either case, the jury should find the fact, that it is parcel of the dwelling-house; according to the determination in Garland's case before mentioned.

Ante, 487. 491.

Garland's case, ante, 493.

MS. Tracy, 79. 84. Moor, 661.

But the indictment need not allege that any person was in the house; for this clause was inserted in after the stat. 23 H. 8. which takes away clergy where any person in the house was put in fear: and now the stat. 18 Eliz. takes away clergy in all cases of burglary.

Post. § 30.

It

Ch. XV. § 24. *Indictment, Evidence, &c.*

It is neceſſary to aſcertain to whom the manſion belongs, and to ſtate that with accuracy in the indictment; and therefore, where the priſoner was indicted for burglary in the dwelling-houſe of John Snoxall, and ſtealing therein goods the property of Ann Lock; and it appeared that it was not the dwelling-houſe of J. S. Buller and Groſe Juſtices held that the priſoner could not be found guilty either of the burglary, or ſtealing to the amount of 40*s.* in the dwelling-houſe; for it is eſſential in both caſes to ſtate in the indictment the name of the perſon in whoſe houſe the offence was committed. In Cole's caſe it was ſtated to be the ſhop of one Richard —— (leaving a blank for the ſurname); on which account it was doubted by B. R. whether it could be ſupported; though the Reporter ſays it was holden good.

Whoſe manſion. White's caſe, O.B. Feb. 1783. Leach, 216. (new edit. 286.)

W. Woodward's caſe, O.B. 1765. S. P. Cole's caſe, Moor, 466. *Vide* 1 Hale, 558.

The indictment muſt not only ſtate the fact to have been done in the night of ſuch a day; but it ought alſo to expreſs at about what hour of the night it happened: though it does not ſeem neceſſary that the evidence ſhould ſtrictly correſpond with the latter allegation. In Waddington's caſe the indictment for burglary alledged the fact to have been committed in the night, but did not expreſs at or about what hour it was done. Gould J. held the indictment inſufficient as for a burglary, and directed the priſoner to be found guilty of ſimple larceny only. He ſaid that as the rule now eſtabliſhed was, that a burglary could not be committed during the twilight, it was therefore neceſſary to ſpecify the hour in order that the fact might appear upon the face of the indictment to have been done between the twilight of the evening and that of the morning.

In the night. 1 Hale, 549. 2 Hale, 179.

Waddington's caſe, Lancaſter Lent Aſſ. 1771. Burn's Juſt. tit. *Burglary.*

§ 25. *Intent.* 1 Hale, 550, 9.

Further it muſt be alleged and proved, either that a felony was committed in the dwelling-houſe, or that the party broke and entered with intent to commit ſome felony within the ſame.

Dobbs's caſe, Buckingham Aſſ. 30 July 1770. Serjt. Forſter's MS. *Vide* 1 Hale, 561.

Joſeph Dobbs was indicted for burglary in breaking and entering the ſtable of James Bayley, part of his dwelling-houſe, in the night, with a felonious intent to kill and deſtroy a gelding of one A. B. there being. It appeared that the gelding was to have run for 40 guineas, and that the priſoner cut the ſinews of his fore-leg to prevent his running, in conſequence of which he died. Parker Ch. B. ordered him to be acquitted; for his intention was not to commit the

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felony by killing and deſtroying the horſe, but a treſpaſs only to prevent his running; and therefore no burglary. But the priſoner was again indicted for killing the horſe, and capitally convicted.

But whatever be the felony really intended, the ſame muſt be laid in the indictment and proved agreeably to the fact.

O. B. Oct. 1700. Serjt Forſter's MS. & *vide* poſt. 519. R. v. Vandercomb and Abbot.

One was indicted for burglary and ſtealing goods. It appeared that there were no goods ſtolen, but a burglary with intent to ſteal; and not being ſo laid, as it ought to have been, Lord C. J. Holt directed the priſoner to be acquitted.

MS. Burnet, 83. 1 Hale, 561. poſt. f. 26.

And ſo if it be alleged that the entry was with intent to commit one ſort of felony, and the fact appear to be that it was with intent to commit another; that is not ſufficient.

Rex v. Locoſt and Villers, Kel. 30. 1 Hale, 560.

Though if the intended felony were actually committed, it is enough to lay the breaking and entering to be with intent to do ſo.

Jenks's caſe, C. B. June 1796, and before all the Judges in Mich. T. following, MS. Buller J. and MS. Jud. (2 Leach, 896. S. C.)

So where the indictment was for breaking, &c. the houſe of J. Davis, with intent to ſteal the goods of J. Wakelin, in the ſaid houſe being, and there was no ſuch perſon who had goods in the houſe: but J. W. was put by miſtake for J. D.; the priſoner was entitled to an acquittal: and it was ruled that the words "*of J. W.*" could not be rejected as ſurpluſage; for the words were ſenſible and material; it being material to lay truly the property in the goods; and without ſuch words the deſcription of the offence would be incomplete. This it ſeems is not like the caſe of laying a robbery in the dwelling-houſe of A., which turns out to be the dwelling-houſe of B.; becauſe that circumſtance is perfectly immaterial in robbery, which is ouſted of clergy generally; as was determined in Pye's caſe. Nor is this like Morris's caſe, where the name was ſo introduced as to make the ſentence inſenſible.

Vi. tit. Larceny, f. 168. and Indictment—Surpluſage.

But it ſeems in all caſes ſufficient, where a felony has been actually committed, to allege the commiſſion of ſuch felony; for, as Lord Hale obſerves, that is ſufficient evidence of the intention. The ſtat. 12 Ann. c. 7. ſeems to have been drawn with that view. It is, beſides, a general rule, that a man who commits one ſort of felony, in attempting to commit another, cannot excuſe himſelf upon the ground

1 Hale, 560. Ante, f. 6.

that

that he did not intend the commiſſion of that particular offence. Yet this it ſeems muſt be confined to caſes where the offence intended is in itſelf a felony, according to the reſolution in Dobbs's caſe before mentioned.

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Ante, 513.

§ 26. *Different intents.*

But the ſame fact may be laid with ſeveral intents. In Thompſon's caſe, which was an indictment for burglary, the firſt count laid the fact to be with intent to ſteal the goods of T. D.; the ſecond count laid it with intent to kill and murder him. Upon a general verdict of guilty, it was objected that there were two ſeveral capital charges in the ſame indictment, which, it was ſaid, tended to deprive the priſoner of ſo many challenges as he would be entitled to if the indictments were diſtinct; namely, 20 upon each. Another objection was, that it would tend to perplex the priſoner in his defence. But ſeven Judges (being all who were preſent at the conference,) held the indictment good. They ſaid it was the ſame fact and evidence, only laid in different ways. Whereas in O'Connor's caſe, in Lord C. J. Ryder's time, there were two diſtinct felonies charged in ſeveral counts; one for hiring A. with intent to cauſe him to be enliſted in the French king's ſervice; the other a ſimilar charge with reſpect to B.: and in that caſe no judgment was given; the priſoner being diſcharged from the indictment by the conſent of the attorney-general: and the rather upon the doubt whether the fact found amounted to the felony.

Rex v. Thompſon, Norfolk Sum. Aſſ. 1-81. MS. Gould J.

Mich. T. 1781.

See more under tit. Indictment, Joinder, and infra.

§ 27. *Different offences joined in ſame indictment, and ſeverance by verdict.*

Further, the indictment may be ſo laid as to compriſe other offences than burglary, though connected therewith; ſo that the priſoner may be acquitted of part and found guilty of the reſt. As if the priſoner be charged that he feloniouſly and burglariouſly broke and entered the dwelling-houſe of J. S., and then and there certain goods of J. S. feloniouſly and burglariouſly did ſteal, &c.: the indictment compriſes two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if the caſe be ſo upon the evidence, and found guilty only of the larceny. But in ſuch caſe, if the priſoner be acquitted of the larceny, it ſeems he cannot be found guilty of the burglary; becauſe as it is thus charged, the larceny conſtitutes part of the burglary. For though the act of theft being charged is a ſufficient allegation by intendment of law of the priſoner's

1 Hale, 559. 2 MS. Sum. poſt. 517. R. v. Withal & Overend, and R. v. Hungerford, poſt. 518.

Ante, 514.

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felonious intention; yet when he is acquitted of that, there being no expreſs charge of an intention to ſteal, it ſtands ſingly as if the indictment had been of a breaking and entering, &c. without any allegation of a felonious intent. And of this opinion was Lord Holt, at the Old Bailey, October, 1700. Therefore, ſays Lord Hale, the better way is to charge the priſoner with breaking, &c. with intent feloniouſly and burglariouſly to ſteal the goods, &c. therein, and to add alſo the particular felony: and then, though he be acquitted of the felony, the indictment ſtands good againſt him as for a ſimple burglary. The ſame author alſo thinks that three offences may be laid in the ſame indictment, namely, burglary, larceny, and felony upon the ſtatute 5 & 6 Ed. 6. c. 9. and the form of the indictment may run thus, That A. on, &c. in the night of the ſame day, with force and arms, at, &c. the dwelling-houſe of B., &c. feloniouſly and burglariouſly did break and enter, with intent the goods and chattels of the ſaid B., in the ſaid dwelling-houſe then and there being, feloniouſly and burglariouſly to ſteal, &c. and then and there, with force and arms, one ſilver cup, &c. of the ſaid B. then and there being, feloniouſly and burglariouſly did ſteal, &c. the ſaid B., his wife, and children, and family, in the ſaid dwelling-houſe then and there being, againſt the peace, &c. And ſuch indictment need not conclude againſt the form of the ſtatute. Hereby the priſoner may be either convicted of the burglary and not of the larceny, or convicted of the felony within the ſt. 5 & 6 Ed. 6.; in either of which caſes he is ouſted of clergy; or he may be convicted of the ſimple larceny, and ſo have the benefit of clergy.

Ante, 514.

1 Hale, 560. 2 MS. Sum. MS. Burnet, 84.

§ 28. *Verdict and judgment.* Comer's caſe, 30th Nov. 1744. 2 MS. Sum. Serjt. Forſter's MS. S. C. Leach, 34. (new edit. 43.)

There is a note of a caſe of Rex v. Comer, which is in general circulation, wherein it was ſuppoſed that much depended upon the manner of entering the verdict: for in that caſe, upon an indictment for burglary (*a*) and ſtealing goods in the houſe of the value of 150l., where the verdict was, "guilty of felony only in ſtealing goods to the value of 150l. from the dwelling-houſe, and not guilty of the burglary;" it was holden, that by a general acquittal of the burglary, which as the indictment was laid included (as was ſaid) the breaking and entry and taking of the goods, the priſoner was by neceſſary

(*a*) By this muſt be underſtood breaking and entering the dwelling-houſe of ſuch an one in the night-time, without laying it to be done with a felonious intent.

conſequence

consequence acquitted of the felony also. But they agreed that if the entry of the verdict had been "not guilty of the "breaking and entering the house in the night-time, but "guilty of the rest of the indictment," the prisoner would then have been convicted of stealing goods to the value of 40s. in the dwelling-house, and been ousted of clergy by stat. 12 Ann. c. 7. But I have seen a note of this case of Mr. Justice Abney's, (wherein it is called Hugh Connor's case), which throws great doubt upon the accuracy of the above statement. From the latter it appears that Lord C. J. Lee, Parker C. B. and the Judges, Reynolds, Abney, Burnet, Denison, and Clarke, thought that the prisoner was ousted of clergy on the finding of the jury. Willes C. J. inclined that the indictment was ill. Wright J. contrà. The other three were absent. But upon the doubt conceived by the minority, and the prisoner having lain many months in prison, they all agreed to recommend him for a pardon on the terms of transportation. At any rate this was an over-strained nicety, which has been since corrected upon better consideration.

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Vide 1 Hale, 559, 560. Summers's case, 1706. Com. Rep. 481.

Hungerford's case, post. 518.

Withal and Overend were indicted for feloniously and burglariously breaking and entering the dwelling-house of E. P., and stealing therein 60 l. The jury found them not guilty of the breaking and entering the dwelling-house in the night, but guilty of stealing the money in the dwelling-house. It was objected for the prisoners that they were not excluded clergy, because the jury had acquitted them of the burglary, and there was no separate count in the indictment on the stat. 12 Ann. c. 7. for stealing in the dwelling-house to the value of 40s. This matter being reported to the Judges in Mich. term 1773, a great majority were of opinion that where a prisoner is indicted for a complicated offence comprehending in itself divers circumstances of aggravation, each of which is ousted of clergy; though he be acquitted of some of those circumstances, yet if he be found guilty of others from which the benefit of clergy is excluded, he shall receive sentence of death. As if one be indicted of burglary and stealing a sheep, and he be acquitted of the breaking, &c. but found guilty of the sheep-stealing, no other than a capital judgment can be pronounced against him. But a few of the Judges still doubting, the further consideration of the

Rex v. Withal and Overend, Guildford Ass. 1773. MS. Crown Cas. Res. & MS. Jud. Serjt. Forster's MS. (S. C. 1 Leach, 102.)

On indictment for burglary and stealing, &c. defendant being acquitted of the breaking, &c. but found guilty of stealing above 40s. in the dwelling-house, is ousted of clergy.

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case was adjourned to Hilary term 1774, and in the mean time Lord C. B. Parker furnished the note of Comer's case first before mentioned. Finally, all the Judges were of opinion that the prisoners were ousted of their clergy by this finding; for the indictment contained every charge necessary upon the stat. 12 Ann. c. 7. namely, a stealing in a dwelling-house to the amount of 40s., and the jury had found them guilty of that charge.

Hungerford's case, Bristol, 1790. MS. Buller J.

William Hungerford was indicted before the Recorder of Bristol for feloniously and burglariously breaking and entering the dwelling-house of J. H., and feloniously and burglariously stealing therein the goods, &c. of the value of 6l.

Manner of taking the verdict in case of burglary and felony joined.

The verdict was, "not guilty of the burglary, but guilty of stealing above the value of 40s. in the dwelling-house;" and the entry by the officer was in the same words. Judgment of death was given, but execution was respited till the opinion of the Judges could be taken. In Easter term 1790 the Judges, after some debate, adjourned this case to the next term; and on the 21st of June following they held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury, which admitted of no doubt. That the minute was only for the future direction of the officer, and to shew that the jury found the prisoner guilty of the larceny only. But many of the Judges said, that when it occurred to them they should direct the verdict to be entered "not guilty of the breaking and entering in the night, but guilty of the stealing," &c.; as that was more distinct and correct. It appeared upon inquiry to be the constant course on every circuit in England upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of manslaughter;" or "not guilty of murder, but guilty of feloniously killing and slaying:" and yet murder includes the killing. They added that the whole verdict must be taken together; and the jury must not be made to say that the prisoner is not guilty generally, when they find him expressly guilty of part of the charge; or to appear to speak contradictorily by means of the officer's using a technical term, when the verdict is sensible and intelligible in itself.

But

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But where ſeveral were indicted together for burglary (*a*), and for feloniouſly ſtealing goods, &c. in the houſe; it ſeemed to the two Chief Juſtices and others that the jury could not find one guilty of the burglary, and another guilty of the larceny only, upon the ſame indictment and the ſame evidence. In truth, ſuch a finding ſhewed that the offences of the ſeveral priſoners were of a diſtinct nature, and therefore ought not to have been included in the ſame indictment.

Rex v. Turner and others, 1 Sid. 171.

§ 29. *Acquittal of burglary with one felonious act, and indictment for the ſame burglary with another ſuch act.*

It was formerly conſidered that a perſon indicted and acquitted for breaking and entering a dwelling-houſe in the night, and there ſtealing the goods of one perſon, could not be afterwards indicted for the ſame breaking and entering, and ſtealing the goods of another perſon; though he might be indicted of the ſimple larceny: but the caſes in which that doctrine was eſtabliſhed have been ſince denied to be law in the caſe of Vandercom and Abbott. The priſoners were indicted for burglariouſly breaking and entering the dwelling-houſe of Merial Nevill and Ann Nevill, &c. *with intent* to ſteal their goods therein being: to which they pleaded auterfoits acquit upon a former indictment, charging the ſame facts, with this difference, that inſtead of the breaking, &c. being laid *with intent to ſteal, &c.* the indictment charged an actual ſtealing of certain goods of Merial Nevill, and certain other goods of Ann Nevill, and certain other goods of one Suſanna Gibbs (*b*), and concluding with an averment of the identity of the perſons, and that the two indictments were for the ſame burglary. The caſe was argued upon demurrer before all the Judges, and they unanimouſly held the plea bad: the grounds of which judgment were afterwards ſtated by Buller J. at the Old Bailey in June 1796. He began by obſerving that on the part of the priſoners it was contended, that as the dwelling-houſe mentioned in the two indictments, and the times mentioned in each when the offence was committed, were the ſame, therefore the offence was the ſame, and the acquittal on the

Rex v. James Vandercom and James Abbott, O. B. Jan. 1796 MS. Buller J. *An acquittal upon an indictment for burglary in breaking, &c.* AND STEALING *the goods of A. and of B. and of C. cannot be pleaded in bar to an indictment for burglary in the ſame dwelling-houſe on the ſame night* WITH INTENT *to ſteal the goods of A. and B. Auterfoits acquit cannot be pleaded, unleſs the facts charged in the ſecond indictment would, if true, have juſtified the firſt indictment.*

(*a*) *Vide* ante, p. 516. n. (*a*).

(*b*) Mr. Juſtice Buller in delivering the opinion of the Judges on this caſe obſerved, that the property in the goods was diff rently deſcribed in the two indictments, which might afford another objection to the plea; but that he had not entered into the conſideration of that circumſtance, as the caſe did not require it. MS. Buller J.

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former indictment a bar to the preſent. And further, that burglary was defined to be a felonious breaking and entering of a manſion-houſe in the night-time, to be completed by felony or an intention to commit it. And that two caſes in Kelyng were relied on in ſupport of the plea of auterfoits acquit. (After ſtating the two indictments he proceeded,) The queſtion is, Whether the ſeveral offences deſcribed in the two indictments can be ſaid to be the ſame? That there was only one act of breaking the houſe, and a felony committed only at one time, muſt on this record be taken to be clear: but that does not decide the queſtion. The crime of burglary is of two ſorts (*a*); 1. breaking and entering a dwelling-houſe in the night-time, and ſtealing goods there: 2. breaking and entering a dwelling-houſe in the night-time with intent to commit a felony, though that felony be not committed. The circumſtance of breaking and entering the dwelling-houſe is common and eſſential to both, but it does not of itſelf conſtitute the crime in either; for there muſt be a felony committed or intended, without one of which the crime of burglary does not exiſt: and theſe offences are ſo diſtinct in their nature, that evidence of one will not ſupport an indictment for the other. For example, if a man be indicted for breaking and entering a houſe in the night and ſtealing goods there, evidence that he broke, &c. and intended to ſteal goods, or to commit any other felony, would not ſupport the indictment. In the caſe of the preſent priſoners, the evidence applicable to the indictment now depending, which is for breaking, &c. with intent to ſteal, was not evidence to prove the firſt indictment for breaking, &c. and ſtealing goods. Then if the crimes are ſo diſtinct that evidence of one will not ſupport the other, it is inconſiſtent with reaſon to ſay that they are ſo far the ſame that an acquittal of one ſhall be a bar to a proſecution for the other. Neither do legal authorities ſupport ſuch a propoſition. The two caſes quoted on behalf of the priſoners were Turner's caſe, Kel. 30. and Jones and Beaver's caſe,

(*a*) Quære, whether the definition of the crime be not ſolely reſolvable into the breaking, &c. with intent to commit felony; of which the actual commiſſion is ſuch a ſtrong preſumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c. to be *with intent* to ſteal is ſaid to be ſupported by proof of actual ſtealing (ante, 514.) though certainly not vice verſâ.

Kel,

Kel. 52. William and James Turner were indicted for burglary in breaking and entering the dwelling-house of Mr. Tryon in the night, and stealing therein a large sum of money; on which James was found guilty, but William was acquitted. Afterwards, there being strong evidence that William was concerned in the same burglary, and there being 47 l. of the money of one Hill, a servant of Mr. Tryon, stolen at the same time, which was not laid in the former indictment, it was intended to indict him a second time for the burglary in breaking, &c. the house of Mr. Tryon, and stealing the 47 l. of the money of Hill. But it was agreed, says the reporter, that William Turner could not be indicted again for the same burglary, though he might be indicted for felony for stealing the money of Hill. That case was no solemn judgment; for the prisoner was not indicted a second time for the burglary. It was merely a direction from the Judges to the officer of the court how to draw the second indictment; and it proceeded upon a mistake as I shall presently shew. If the Judges in that case exercised a little lenity before the indictment, which might more properly have been done after a conviction, much censure could not fall on them. But they proceeded on the ground that the prisoner having been indicted for burglary in breaking the house of Mr. Tryon and stealing his goods, and acquitted thereof, he could not be indicted again for the same burglary, *for breaking the house;* though he might be indicted for felony for stealing the money of Hill; for they were several felonies, and he was not indicted of that felony before. And he was indicted accordingly. In that case the Judges went on the idea that the breaking the house and the stealing the goods were distinct offences, and that breaking the house only constituted the crime of burglary; which was a manifest mistake. The burglary consisted of breaking the house and stealing the goods; and if the stealing the goods of Hill were a distinct felony from that of stealing the goods of Tryon, (which they admitted it to be,) the burglaries from necessity could not be the same. In that case the fact was, that the prisoner broke the house of Tryon, and stole the money both of Tryon and of Hill at the same time. He had been tried for breaking the house and stealing the money of Tryon, and might have been convicted if the prosecutor had used due diligence about his evidence;

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(Turner's case, Kel. 30.)

so

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ſo that the priſoner's life had been in jeopardy: but ſtill the Judges held that he might be tried for the other part of the ſame act, viz. ſtealing the money of Hill. If no money of Tryon's had been in the houſe or been ſtolen, probably the queſtion never would have ariſen in Turner's caſe; for then the firſt indictment would have been wholly inapplicable to the facts of the caſe, and the priſoner in no danger at all upon it: but that circumſtance could not vary the law of the caſe; and the opinion certainly proceeded from the want of adverting to what was neceſſary to conſtitute the crime of burglary. The caſe of Jones and Beaver proceeded wholly on that of Turner: and if the foundation fail, that caſe muſt alſo fall. There the priſoners were indicted for burglary and ſtealing the goods of Lord Cornbury; and being acquitted, were afterwards indicted for the ſame burglary in breaking, &c. and ſtealing the goods of Mr. Nunneſy: and it was agreed, that being acquitted once, they could not be indicted again for the ſame burglary; but that they might be indicted for ſtealing the goods of N., (according to Turner's caſe.) But authorities are not wanting to ſhew the principle and foundation on which a plea of auterfoits acquit is to be ſuſtained. (He then referred to 2 Hawk. ch. 35. ſ. 3. Foſt. 361, 2. and Rex v. Pedley, B. R. Tr. 1782.) Theſe eſtabliſh the principle, that unleſs the firſt indictment were ſuch as the priſoner might have been convicted upon by proof of the facts contained in the ſecond indictment; an acquittal on the firſt indictment can be no bar to the ſecond. To apply that principle to the preſent caſe: the firſt indictment was for breaking and entering the houſe and ſtealing the goods: if it were proved on that indictment that the priſoners broke and entered the houſe with intent to ſteal the goods, but had not ſtolen them, (which are the facts contained in the preſent indictment,) they could not have been convicted on that indictment by ſuch evidence. They have not then been tried, nor were their lives ever in jeopardy for this offence, which is for breaking the houſe with intent to ſteal the goods. For theſe reaſons the Judges are unanimouſly of opinion that the plea is bad; that there muſt be judgment for the crown on the demurrer; and that the priſoners muſt take their trial upon the indictment now depending.

(Jones and Beaver's caſe, Kel. 32.)

As

Ch. XV. § 30.

§ 30. *Clergy, puniſhment*

As to the puniſhment for this offence; by ſtat. 18 Eliz. c. 7. "Every perſon and perſons who ſhall commit burglary, "and be found guilty by verdict, or be outlawed, or who "upon arraignment ſhall confeſs the ſame, ſhall ſuffer death "and forfeit as in caſes of felony, without benefit of clergy." And by ſtat. 3 W. & M. c. 9. ſ. 2. clergy is alſo taken away if the offender "ſtand mute, or do not directly anſwer, or "challenge peremptorily above 20." And this latter ſtat. (ſ. 1.) alſo ouſts of clergy "every perſon who ſhall counſel, "hire, or command, any perſon to commit any burglary, be- "ing thereof convicted or attainted, or being indicted "thereof and ſtanding mute, not directly anſwering, or "challenging above 20." Alſo by the ſtat. 1 Ed. 6. c. 12. ſ. 10. "Perſons attainted or convicted of breaking any houſe "by day or by night, any perſon being therein and thereby "put in fear or dread, or being indicted or appealed there- "of, and thereupon found guilty by verdict, or who ſhall "upon arraignment confeſs the ſame, or will not directly "anſwer, or ſtand wilfully or of malice mute, ſhall not be "admitted to the benefit of clergy."

18 Eliz. c. 7.
3 W. & M. c. 9. ſ. 2. 1 Hale, 562. 2 Hale, 361. 2 Hawk. ch. 33. ſ. 104, 105, 6.

1 Ed. 6. c. 12. ſ. 10. *vide* tit. Larceny.

By ſtat. 5 Ann. c. 31. ſ. 5. (which is principally levelled at the receivers of ſtolen goods,) "any perſon who ſhall re- "ceive, harbour, or conceal any burglars, &c. knowing "them to be ſo, ſhall be taken as acceſſary to the ſaid fe- "lony, &c. and being thereof legally convicted by the "teſtimony of one or more credible witneſſes, ſhall ſuffer "death as a felon convict."

5 Ann. c. 31. ſ. 5. *Acceſſaries after.*

Alſo, perſons indicted in one county for ſtealing goods obtained by burglary in another county are ouſted of clergy, as is elſewhere ſhewn.

Vide tit. Larceny, ſ. 157.

A reward of 40 l. and certificate of exemption from pariſh offices are given upon the conviction of burglars by ſeveral ſtatutes; and alſo a pardon to an offender out of priſon diſcovering two or more accomplices.

See general tit. Rewards, &c.

As a means of preventing this offence, perſons apprehended, having upon them any implements of houſebreaking, ſhall by ſtat. 23 Geo. 3. c. 88. be deemed rogues and vagabonds within the vagrant act 17 Geo. 2. c. 5.

23 G. 3. c. 88.

CHAP. XVI.

LARCENY AND ROBBERY.

Larceny.

Introduction. - - - § 1.

Definition.—The fraudulent or wrongful taking and carrying away by any Perſon of the mere perſonal Goods of another, from any Place, with a felonious Intent to convert them to his (the Taker's) own Uſe, and make them his own Property, without the Conſent of the Owner. - - § 2.

I. *What a mere taking.* - - § 3.

There muſt be a taking in fact of the Thing, ſufficient to conſtitute a Treſpaſs, either from the actual or conſtructive Poſſeſſion of the Owner. *ib.*

If Delivery to the Party be voluntary, no ſubſequent Converſion will make it Treſpaſs. Aliter, if Delivery obtained by Force, Threat, or Fraud. *ib.*

Inſtances of felonious taking on a Privity of Bailment determined; on a bare Charge; on Poſſeſſion obtained by Fraud; or upon a colourable Gift extorted by Fear. *ib.*

Taking by the Hand of the Law, or of an innocent Perſon. *ib.*

II. *What a carrying away.* - - § 4.

The leaſt Removal of the Thing from the Place where it was, though not carried off. *ib.* Carrying Sheets from a Bed into the Hall. *ib.* Taking Horſe in a Cloſe, though detected before he got it out. *ib.* Removing Parcel from one End of Waggon to another. *ib.* But not ſetting Package upright in the ſame Place when it was lying lengthways, it not being entirely lifted off from the ſpot. *ib.*

Nor

Nor taking Purſe out of Owner's Pocket, or Shop, to which it ſtill continued faſtened by a String. §4.
Nor if in ſtruggling the Purſe fall to the Ground, the Robber not having hold of it, &c. *ib.*
But ſnatching an Ear-ring out of the Ear by Force, though it were loſt again inſtantly and fell into the Party's Hair, is ſufficient. *ib.*
If the Thief once take, though he immediately return the Thing again, it is Larceny. - §5.
Where there is one continuing Tranſaction, all may be guilty as Principals, though ſeveral diſtinct Aſportations; if all concur before final Aſportation from virtual Cuſtody of Owner. - - §6.

III. *By whom in particular Larceny may be committed.* - - - §7.

1. Not by Joint Tenants. *ib.*
But by one of his own Goods from the Cuſtody of another, having ſpecial Property in them, and with fraudulent Intent to charge him or the Hundred for the Value. *ib.*
2. But not by *Wife* from her Huſband. - §8.
Nor by any other from him by her Delivery. *ib.*
Nor by Wife from any other in Huſband's Preſence. *ib.*
Aliter, if by his Command in his Abſence. *ib.*
On Indictment againſt both, Huſband may be acquitted and Wife convicted, as well as vice verſâ. *ib.*
Where it lies on Wife to prove her Marriage. *ib.*
3. *By Servants*, of the Things entruſted to their Charge or Cuſtody. - - - §9.
i. Upon Stat. 33 H. 6. c. 1. making Spoil of Maſters Goods on their Death. *ib.*
ii. Upon Stat. 21 H. 8. c. 7. - §10.
Servants withdrawing themſelves with Things delivered to them by Maſters to keep, or embezzling them to the Value of 40s. made Felony; but Clergy not ouſted, unleſs Goods taken out of Dwelling-houſe, &c. by Stat. 12 Ann. c. 7. *ib.*
Nor as it is ſaid Offenders tranſportable; ſed Quære. *ib.*

To

(*By whom.*)

To what Servants and in what Inſtances the Statute extends. - - - § 11.

Not to Apprentices: but they are liable at common Law. *ib.*

To what Goods. Such as are delivered by Maſter to the Servant to be returned in Specie. § 12.

Form of Indictment thereon. - - § 13.

iii. By common Law Servants having only a bare Charge or Cuſtody of their Maſter's Goods may be guilty of Larceny in taking them, on the Principle that Poſſeſſion of Servant for the Maſter is Poſſeſſion of Maſter. - - - - § 14.

As where a daily Clerk embezzled a Bill of Exchange delivered to him by his Maſter to ſend by the Poſt. § 15.

Or where a Tradeſman's Servant broke open and purloined a Package of Goods delivered him to carry to a Cuſtomer. *ib.*

Or where a Servant went off with Money delivered to him to carry to another. *ib.*

Or where one entruſted with his Maſter's Caſh Concerns got a Bill diſcounted in order to abſcond with the Money, which he did. *ib.*

Aliter, where Maſter had no otherwiſe the Poſſeſſion than by Receipt of the Servant by Delivery of another for his Maſter's Uſe, in which Caſe Embezzlement of the Servant no Larceny at common Law. § 16 & 17.

Unleſs where Servant has firſt done ſome act to determine his original excluſive Poſſeſſion, as by depoſiting the Goods in his Maſter's Houſe, Barge, &c. *ib.*

Or where he ſeparates Part from the Reſt, and conveys it away from the Veſſel on board which his Maſter had purchaſed it. *ib.*

And now by Stat. 39 Geo. 3. c. 85. Servants or Clerks receiving Money, Goods, Bonds, &c. or other valuable Securities or Effects on Account of their Maſters, &c. and fraudulently embezzling the ſame, ſhall be deemed to have feloniouſly ſtolen the ſame; and are ſubjected to Tranſportation not exceeding 14 Years. - - - § 18.

iv. *By*

(*By whom.*)

4. *By Officers and Servants of the Bank.* - § 19.
Felony without Clergy by Stat. 15 Geo. 2. c. 13. ſ. 12. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. in ſuch Perſons embezzling any Note, Dividend-Warrant, Security for Money or Effects, &c. belonging to or depoſited with the Bank.

5. *By Officers and Servants of South-Sea Company.* § 20.
The ſame Proviſions as above.

6. *By Perſons employed in or by the Poſt-Office.* § 21.
Secreting, embezzling or deſtroying any Letter, &c. entruſted to their Care or coming to their Poſſeſſion, containing any Bank Note, Bill of Exchange, &c. Dividend-Warrant, &c. Felony without Clergy by Stat. 7 Geo. 3. c. 50. - - - § 21.
Though Defendant have not taken the Oath required by Stat. 9 Ann. c. 10. ſ. 41. of Perſons employed by the Poſt-Office. *ib.*
Qu. Whether one indicted as *Charger and Sorter* of Letters for ſuch embezzling may not be convicted thereof as Sorter only. But if acquitted on ſpecial Count, he cannot be convicted on general Count as a Perſon employed in the Poſt-Office, being no otherwiſe employed than as Sorter. *ib.*
A Bill of Exchange may be laid as a Warrant for the Payment of Money within the Act. - § 22.
Stealing Letter containing Money not within the Act. *ib.*
Indictment for *ſecreting two Letters* containing therein a Bank Note, and Proof that the Bank Note was ſent in Halves on different Days, held within the Act. *ib.*
Aliter perhaps of a *Taking* which means the original Taking. *ib.*
Qu. As to ſecreting Letter containing a Bank Note, not knowing the Contents, with Intent to embezzle Poſtage paid. - - - § 23.
Semble within ſ. 19. of 5 Geo. 3. c. 25. which makes it Felony to embezzle Poſtage received with Letter. *ib.* & § 24.

Alſo

(*By whom.*)

Alſo Felony by ſame Act, to deſtroy Letter or advance Rate of Poſtage and embezzle it. - § 24.

How far varied by Stat. 7 Geo. 3. c. 50. ſ. 3. *ib.*

Letter-Carriers, &c. or others employed in Poſt-Office taking or receiving any Letter, &c. and Poſtage thereof, and deſtroying Letter, &c. or advancing Rate of Poſtage on Letters, &c. and not duly accounting for the Money, guilty of Felony by Stat. 7 G. 3. c. 50. ſ. 3. *ib.*

Stealing Letters, &c. by Perſons in general, vide Poſt.

7. *By Perſons employed in Manufactures.* - § 25.

Embezzling, &c. by thoſe employed in Hat, Woollen, Linen, Fuſtian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, or Silk Manufactures, puniſhed by Fine, Whipping, and Impriſonment, on ſummary Conviction, by Stat. 17 Geo. 3. c. 56. *ib.*

8. *By Lodgers.* - - - § 26.

Stealing Furniture, &c. in Lodgings declared Felony by Stat. 3 & 4 W. & M. c. 9. ſ. 5. *ib.* But not where whole Houſe let, or where Contract with Lodger to make good what is miſſing. *ib.*

How Indictment to be framed to bring the Caſe within the Statute. *ib.*

IV. *Of what Things Larceny may be committed.* § 27.

1. Of *Goods perſonal*, not of the *Realty*, nor affixed thereto. *ib.*

Unleſs ſevered by diſtinct Act at different Time before Removal. *ib.*

Exceptions by Statute.

Stealing, &c. in the Night-time, *Roots*, *Shrubs*, or *Plants*, value 5 s. growing in incloſed Grounds, Felony and Tranſportation for 7 Years by Stat. 6 Geo. 3. c. 36. - - - § 28.

The ſame Offence in Day-time to any Value puniſhable by Fine on 1ſt and 2d Offence before Magiſtrate: 3d Offence Felony and Tranſportation for 7 Years by Stat. 6 Geo. 3. c. 48. which being paſſed

in the ſame Seſſion as the former, they muſt be conſtrued together. - - - - § 28.

But ſtealing, &c. Turnips, Potatoes, &c. ſubject in all Inſtances only to Fine and Impriſonment upon ſummary Conviction, by Stat. 13 Geo. 3. c. 32. *ib.*

ii. The ſame Statutes of the 6 Geo. 3. with the like Conſtruction apply to the ſtealing, &c. certain *Timber-Trees*, or other Trees ſtanding for Timber, or likely to become ſo. - - - - § 29.

What Trees are within theſe Acts, and that of 13 Geo. 3. c. 33. *ib.*

iii. Stealing or breaking, &c. with Intent to ſteal any *Lead*, *Iron Bar*, Grate, Paliſadoe, or Iron Rail fixed to Dwelling-houſe or other Building, or fixed in any Garden, Fence, Outlet, &c. Felony and Tranſportation for 7 Years by Stat. 4 Geo. 2. c. 32. § 30.

The ſame Proviſion extended to any *Copper*, *Braſs*, *Bell-metal* Utenſil or Fixture, by Stat. 21 Geo. 3. c. 68. *ib.* And alſo to any Iron Rail or Fencing fixed in any Square, Court, or other Place. *ib.*

And to all Aiders; and to Buyers and Receivers of the ſame. *ib.*

A Church is a Building within the Stat. 4 Geo. 2. and Lead fixed thereto may be laid to be the Property of the Vicar; but better laid to be "fixed to a certain Building being the Pariſh Church," &c. § 31.

But Iron Rails fixed to Tomb in Church-yard not within the Act. Nor a Window Caſement of Iron, Lead, and Glaſs, as ſuch.

But ſtealing Lead from Houſe in Poſſeſſion of Priſoner under fraudulent Pretence of Leaſe, within Stat. *ib.*

Stealing to the Value of 10d. held within the Acts, and Judgment of whipping. *ib.*

iv. *Black Lead*; entering with Force the Mines with Intent to ſteal, or ſtealing the ſame there, or aſſiſting or commanding, &c. thereto; Felony, puniſhed by Impriſonment, hard Labour, and public whipping, or Tranſportation; returning therefrom before Term, Death. § 32.

Buyers and Receivers guilty of Felony, and puniſhable as in other Caſes. *ib.*

2. *Coals ſevered*, and Tools for cutting; ſtealing puniſhable as Miſdemeanor on Conviction, by Stat. 39 & 40 Geo. 3. c. 77. - - - § 33.
3. Larceny cannot be committed of *Charters or other Aſſurances* concerning the Realty. - § 34.
4. Stealing, &c. *Records*, Felony by Stat. 8 H. 6. c. 12. § 35.
Trial before a peculiar Juriſdiction. *ib.*
To what Courts and Perſons the Act extends. *ib.*
Indictment how to be framed. *ib.*
5. Stealing Bonds, Bills, Notes, Exchequer Orders, Dividend-Warrants, &c. Navy Bills or Debentures, &c. Felony, with or without Clergy, as if Offender had ſtolen or taken by Robbery Goods of like Value with the Money thereby ſecured by Stat. 2 Geo. 2. c. 25. ſ. 3. revived by Stat. 9 Geo. 2. c. 18. § 36.
Stealing one Bank Note is within the Act, though in the plural Number. - - § 37.
So ſtealing Note payable to Order, but not indorſed. *ib.*
Compelling one by Dureſs to make a Promiſſory Note on ſtamped Paper before prepared by Priſoner, and immediately afterwards withdrawn, not within the Stat. *ib.*
Where an expired Statute is revived by another, Indictment laying Offence againſt *the Statute*, good. *ib.*
Bank Notes cannot be laid as *Chattels*; but this is Surpluſage. Nor as Notes *commonly called Bank Notes*, that not being the Deſcription in the Statute. *ib.*
Indictment for Larceny of Bill of Exchange in L. ſuſtained by Evidence that when found on Priſoner there it had Indorſement (made after the Felony) not laid in Indictment. A general Deſcription of the Bill, &c. in the Indictment is ſufficient. *ib.*
The ſtealing of ſuch Securities in the Bank of England by their Officers, &c. ante, § 19.
6. *Letters, &c. ſent by the Poſt.* - - § 38.
Stealing or robbing any Mail or Bag of Letters, or any Letter or Packet from any Poſt-houſe, &c. Felony without Clergy, by Stat. 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. ſ. 3.
Embezzlement by Perſons employed in Poſt-office; alſo of what Securities, &c. and in what Manner ſuch ſtealing may be; ante, § 21, &c.

Obtaining

Obtaining the Mail Bag by Delivery out of the Window of Poſt-office by pretending to be the Guard, a ſtealing within the Act. - - § 39.

Taking Letter out of the Office, with Intent to deliver it to the Owner, and only to embezzle Poſtage, not a ſtealing of Letter within St. 7 Geo. 3. c. 50. ſ. 2. *ib.*

Indictment for ſtealing Letter from Perſons uſing Firm of *Meſſrs.* A. B. and C. ſuſtained by Proof that they anſwered to ſuch Addreſs by others, though they only ſtiled themſelves A. B. and C. *ib.*

Indictment for robbing Mail Bag of Letters muſt be laid in County where Fact happened, and not merely where Priſoner was in poſſeſſion of Letters. *ib.*

7. *Things where none have determinate Property.* § 40.

Larceny cannot be committed of ſuch; as of Waifs, as ſuch, before Seizure. Qu. How of Wreck. *ib.*

8. *Animals feræ Naturæ.* - - § 41.

i. No Larceny of ſuch, unleſs dead, reclaimed, or confined; and ſo ſtated in the Indictment. *ib.* Nor of the Eggs of ſuch as are unreclaimed. *ib.*

ii. *Deer.* - - - § 42.

Stealing ſuch (being armed and diſguiſed) Felony without Clergy in Principals and Procurers, by Stat. 9 Geo. 1. c. 22. *ib.*

So not ſurrendering on Proclamation. *ib.*

But ſtealing in general Red or Fallow Deer in incloſed Places, &c. is Miſdemeanor only, puniſhable with Fine for 1ſt and 2d Offence; Felony and Tranſportation for 3d Offence, by Stat. 16 Geo. 3. c. 30. *ib.*

iii. *Fiſh.* - - - § 43.

Stealing ſuch out of River or Pond by Perſons armed and diſguiſed, a capital Felony by Stat. 9 Geo. 1. c. 22. *ib.*

What a ſufficient reclaiming to make them the Subject of Larceny at common Law. *ib.*

Stat. 22 & 23 Car. 2. c. 25. ſ. 7. gives treble Damages and 10 s. to the Poor againſt Offender for ſtealing Fiſh out of Ponds, &c. and other ſeveral Waters and Rivers without Conſent of Owner. *ib.*

But by Stat. 5 Geo. 3. c. 14. ſ. 1. ſtealing Fiſh in any Stream or Water in Park, &c. incloſed, or Garden,

&c. adjoining Dwelling-houſe, without Owner's Conſent; or aiding therein, or receiving or buying them knowingly; Tranſportation. - § 43.

Such ſtealing, &c. (not being in ſuch Park, Garden, &c.) but in any other incloſed Ground, creates Forfeiture of 5 l. *ib.*

In Indictment on Stat. Geo. 3. for ſtealing Fiſh out of Pond, ſtating them to be "Goods and Chattels;" thoſe Words held Surpluſage. *ib.*

Qu. If Indictment at common Law muſt deſcribe what Kind of Pond, &c. *ib.*

iv. *Conies and Hares.* - - § 44.

Stealing, &c. Conies in Grounds incloſed for that Purpoſe before the Act, Miſdemeanor, Impriſonment and Penalty, and finding Sureties, by Stat. 3 Jac. 1. c. 13. Extends not to Hunting, &c. in Day-time. *ib.*

Stat. 22 & 23 Car. 2. c. 25. extends to Ground lawfully uſed for Conies whether incloſed or not, but confines Puniſhment to Conviction before Juſtice of Peace. *ib.*

By Stat. 5 Geo. 3. c. 14. ſuch Offenders in the Night-time ſubjected to Tranſportation or other leſs Puniſhment by Whipping, Fine, or Impriſonment. *ib.*

By Stat. 9 Geo. 1. c. 22. robbing Warrens or Places where Hares or Conies are uſually kept, by Perſons armed and diſguiſed, or reſcuing ſuch Offenders, or procuring others to join therein, Felony without Clergy. *ib.*

Reſult of ſeveral Statutes. *ib.*

9. *Animals of baſe Nature.* - - § 45.

As Foxes, Cats, &c. not Subjects of Larceny. *ib.*

But ſtealing Dogs puniſhable upon ſummary Conviction by Stat. 10 Geo. 3. c. 18. *ib.*

10. *Domeſtic Animals.* - - - § 46.

i. Fit for Food, are Subjects of Larceny. So of their Eggs and Young. *ib.*

ii. *Horſe ſtealing.* - - - § 47.

Felony without Clergy, by Stat. 1 Ed. 6. c. 12. and 2 & 3 Ed. 6. c. 23. and 31 Eliz. c. 12. which latter alſo ouſts Acceſſaries before and after:

But not the Receivers of ſtolen Horſes, though made Acceſſaries after, by Stat. 3 & 4 W. & M. c. 9. *ib.*

Stealing

iii. Stealing *Sheep and other Cattle.* - - § 48.
(i. e. by Stat. 15 Geo. 2. c. 34. Bulls, Cows, Oxen, Sheep, Steers, Bullocks, Heifers, Calves, and Lambs,) Felony without Clergy by Stat. 14 Geo. 2. c. 6.
Indictment for ſtealing Cow not proved by ſhewing it a Heifer. *ib.*
Indictment for ſtealing Lambs proved by ſhewing the Skins taken away, though Carcaſes left. *ib.*
Indictment charging Principal for ſtealing live Sheep, and Acceſſary for receiving Mutton, Part of Goods, &c. ſo as aforeſaid feloniouſly ſtolen, &c. good. *ib.*
iv. The *Products* of ſuch Animals Subjects of Larceny, as Milk, Wool, &c. - - - § 49.
II. *Manufactories.* - - - § 50.
i. A breaking into *Plate Glaſs* Manufactory, and ſtealing Goods, Felony and Tranſportation, or leſs Puniſhment as Court think fit. *ib.*
ii. *Woollen Cloth.* - - - § 51.
Stealing from the Rack or Tenters in the Night, Felony without Clergy; but Court may mitigate to Tranſportation by Stat. 22 Car. 2. c. 5. *ib.*
Extends not to Acceſſaries. *ib.*
Refuſing to be tranſported, or returning before Period, Execution on former Judgment. *ib.*
But by Stat. 15 Geo. 2. c. 27. Magiſtrate may iſſue Search Warrant to ſearch ſuſpected Places, and if on finding ſuch Goods Party give not ſatisfactory Account, he ſhall be deemed to have ſtolen them, and forfeit treble Value; for 3d Offence Felony and Tranſportation: but this not to alter former Law. *ib.*
iii. *Linen, Cotton, &c.* - - - § 52.
Stealing ſuch by Day or Night, expoſed to be printed, bleached, dried, &c. in Grounds, Houſes, &c. uſed by the ſeveral Manufacturers; or aſſiſting, &c. or procuring, &c.; or buying or receiving ſuch ſtolen Goods knowingly, &c. Felony without Clergy; but Court may ſentence to Tranſportation. Stat. 18 Geo. 2. c. 27. *ib.*
Breaking Gaol, or returning from Tranſportation, Death. *ib.*

Breaking into Houſes, &c. with Intent to ſteal ſuch, Felony without Clergy by Stat. 4 Geo. 3. c. 37. § 52.
12. *Naval and Ordnance Stores, &c.* - § 53.
Embezzling the ſame by Perſons having Charge or Cuſtody of them to Value of 20s. Felony, by Stat. 31 Eliz. c. 4. *ib.*
Ouſted of Clergy by Stat. 22 Car. 2. c. 5. with Power in the Court to reprieve and tranſport. *ib.*
Extends not to Acceſſaries or Appeals. *ib.*
Semble Felony at common Law in Perſons having Charge of ſuch Stores to ſteal them, though under 20s. Value. *ib.*
Vid. Poſt, Receivers.
Things ſtolen by Servants, Lodgers, and others under particular Prohibitions, conſidered ante. (§ 26.)
Things under peculiar Sanction on account of the particular Places from whence taken. Poſt.

V. *As to the Place from whence taken.* § 54.
Larceny from the Houſe, &c. - § 55.
In what Caſes Clergy ouſted. - § 56.
1. Where Larceny is above the Value of 12d.
2. Where to the Value of 5s.
3. Where to the Value of 40s. *ib.*

The ſeveral Statutes in order of Time. § 57.
By Stat. 23 H. 8. c. 1. ſ. 3. and 25 H. 8. c. 3. robbing Churches, &c. or robbing Perſons in Dwelling-houſes, the Owner, his Wife, Children, or Servants being therein, and put in Fear, Felony without Clergy. Qu. if repealed as to Clergy. *ib.*
By Stat. 1 Ed. 6. c. 12. ſ. 10. - - § 58.
Breaking Houſe by Day or Night, any Perſon being therein and put in Dread; or robbing any Perſon in or near Highway; or ſtealing in any Church or Chapel; Felony without Clergy. *ib.*
Houſebreaking within the Act muſt be attended with Felony. *ib.*
By Stat. 5 & 6 Ed. 6. c. 10. - - § 59.

Perſons

Perſons convicted of Larceny in one County where Goods taken by Robbery or Burglary in another, ouſted of Clergy. - - § 59.

By Stat. 5 & 6 Ed. 6. c. 9. - - § 60.

Robbing Perſons in Dwelling-houſes, the Owner, his Wife, Children, or Servants being therein, or in any other Place within the Precincts of the ſame, whether waking or ſleeping, ouſted of Clergy. *ib.*

The like as to robbing any Perſon in a Booth or Tent in a Fair or Market. *ib.*

By Stat. 4 & 5 Ph. & M. c. 4. - - § 61.

Acceſſaries before to Robbery in any Place ouſted of Clergy, i. e. Robberies of ſuch Kind as were before excluded of Clergy in caſe of Principals. *ib.*

By Stat. 39 Eliz. c. 15. - - § 62.

Felonious taking away in the Day-time of Money, Goods or Chattels from any Houſe to the Value of 5 s., though no Perſon be within, ouſted of Clergy. *ib.*

By Stat. 3 W. & M. c. 9. ſ. 2. - § 63.

Perſons ouſted of Clergy by prior Stat. on Conviction, alſo ouſted on ſtanding Mute, &c. *ib.*

By the ſame Stat. ſ. 1. - - § 64.

Feloniouſly taking Goods in Dwelling-houſe, any Perſon therein and put in fear; or robbing Dwelling-houſe, in Day-time, any Perſon therein: or abetting or counſelling, &c. thereto; or to break Dwelling-houſe, Shop, or Warehouſe belonging to or therewith uſed, in Day-time, and ſtealing Money, Goods, &c. of 5 s. Value, though no Perſon within, are ouſted of Clergy. *ib.*

By Stat. 10 & 11 W. 3. c. 23. - § 65.

Privately ſtealing Goods, Wares, or Merchandizes of 5 s. Value in Shop, Warehouſe, Coach-houſe, or Stable, though not broken, nor any Perſon therein; and Aſſiſters, Commanders, &c. ouſted of Clergy. *ib.*

By Stat. 12 Ann. ſt. 1. c. 7. - - § 66.

Stealing Money, Goods, Wares, &c. of 40 s. Value in Dwelling-houſe or Outhouſe, though not broken, and whether any Perſon therein or not, and Aiders, &c. ouſted of Clergy. *ib.*

Not to extend to Apprentices under 15, ſo robbing Maſters. - - - § 66.

Diſtinct Offences within the Statutes.

1. *Larceny or Robbery in a Church or Chapel.* § 67.
Ouſted of Clergy by Stat. 1 Ed. 6. c. 12. ſ. 10. and 3 W. & M. c. 9. as to Principals, but not as to Acceſſaries, unleſs amounting to Burglary. *ib.*

2. *Breaking Houſe by Day or Night, any Perſon therein and put in Fear.* - - - § 68.
Principals ouſted of Clergy by Stat. 1 Ed. 6. c. 12. ſ. 10. and 3 W. & M. c. 9.
Extends to Aiders at the Fact, though they do not enter. *ib.*
Acceſſaries ouſted by Stat. 4 & 5 Ph. & M. c. 4. *ib.*
There muſt be an actual breaking and putting in Fear. *ib.*

3. *The felonious taking, &c. of Goods out of Dwelling-houſe, any Perſon therein and put in Fear, though no breaking.* § 69.
Principals ouſted of Clergy by Stat. 3 W. & M. c. 9. ſ. 1. *ib.*
The ſame Rule as to Dwelling-houſes as in Caſes of Burglary. *ib.*
Semb. Value of Goods taken muſt be above 1 s. unleſs ſuch taking as amounts to Robbery. - § 70.
So it ſeems there muſt be actual Fear, unleſs Goods taken by Robbery in Preſence of Owner, &c. § 71.
Indictment muſt charge a putting in Fear by the Priſoner. *ib.*

4. *Robbing* (*i. e. breaking and taking Goods in*) *Dwelling-houſe in Day-time, any Perſon therein, though not put in Fear.* § 72.
Principals, Aiders, and Acceſſaries before, ouſted of Clergy by Stat. 3 W. & M. c. 9. ſ. 1. *ib.*
How Indictment may lay the Robbing, &c. and how proved. *ib.*
Difference between that and Stat. 5 & 6 Ed. 6. c. 9. *ib.* and - - - - § 73.
As to Value. *ib.*

5. *Robbing* (*i. e. breaking and taking Goods in*) *Booth or Tent in Fair or Market, the Owner or his Family therein.* § 74.

Principals

Principals ouſted of Clergy by Stat. 5 & 6 Ed. 6. c. 9. and 3 and 4 W. & M. c. 9. ſ. 2. - § 74.

6. *Breaking Dwelling-houſe, or Outhouſe, Shop, or Warehouſe, and ſtealing Goods to 5s. Value in Day-time, though no Perſon within.* - - § 75.

Principals ouſted of Clergy by Stat. 39 Eliz. c. 15. and 3 W. & M. c. 9. ſ. 2. and Aiders and Acceſſaries before by ſ. 1. of latter Stat. *ib.*

There muſt be a breaking within Stat. of Eliz. though not mentioned in the enacting Part. *ib.*

Aiders without not entering the Houſe, not within Stat.; but included in Stat. of W. & M. *ib.*

Qu. Whether indictable generally as Principals. *ib.*

Any Removal of the Goods ſufficient, though not out of Houſe. *ib.*

Qu. Whether acceſſorial Stat. of William which drops the Term *Outhouſe*, and adopts thoſe of *Shop* and *Warehouſe*, be co-extenſive with Stat. of Eliz. in ouſting Acceſſaries before of Clergy. - § 76.

Form of Indictment. - - § 77.

7. *Privately ſtealing Goods, Wares, &c. to 5s. Value, in Shop, Warehouſe, Coach-houſe, or Stable, though not broken, nor any Perſon within.* - - § 78.

Stat. 10 & 11 W. 3. c. 23. excludes from Clergy Principals, Aſſiſters, Hirers, and Commanders. *ib.*

If Force be uſed, the Offence is not within the Statute, but the Priſoner may be convicted of ſimple Larceny. § 79.

It extends only to the Owner's Goods, kept in their appropriate Places, and not to the Goods of a Stranger. - - - § 80.

What is *a Shop* or Warehouſe within the Act. *ib.*

Where Goods are kept for Sale, and Cuſtomers go to view them; not mere Repoſitories for ſafe Cuſtody. *ib.*

So as to Coach-houſes and Stables, the Goods muſt be ſuch as are uſually lodged in ſuch Places. *ib.*

8. *Larceny in Dwelling-houſe or Outhouſe of Money, Goods, Wares, &c. to 40s. Value, though Houſe not broken, and whether any Perſon within or not.* - § 81.

Clergy

Clergy ouſted by Stat. 12 Ann. ſt. 1. c. 7. § 81.
Exception as to Apprentices under 16. *ib.*
Extends not to Outlawry, nor to Acceſſaries before. *ib.*
Nor to ſuch Offence by Owner in his own Houſe. *ib.*
The Goods muſt be under the Protection of the Houſe for ſafe Cuſtody, not merely of a Perſon within it. § 82.
Bank Notes are within the Stat. - § 83.
Reſult of the Statutes againſt Houſe Larcenies and Robberies, as to Clergy. - - § 84.

In Ships. - - - § 85.

In Veſſels, Boats, &c. in navigable Rivers, &c. Larceny to 40s. Value, Felony without Clergy by Stat. 24 Geo. 2. c. 45. *ib.*
It provides alſo for Veſſels, &c. in Creeks, &c. *ib.*
Plundering Goods or Effects from Ships in Diſtreſs, wrecked, or ſtranded, excluded from Clergy by Stat. 26 Geo. 2. c. 19. - - - § 86.
So ſtealing Pump, by Stat. 12 Ann. ſt. 2. c. 18. ſ. 5. *ib.*
If the Things ſtolen be of ſmall Value, without Cruelty or Violence, Offender may be indicted for Petit Larceny by Stat. of Geo. 2. *ib.*
Expoſing ſuch Goods or Effects to Sale, without accounting for them to Satisfaction of one Juſtice, puniſhable by Impriſonment and treble the Vaule. *ib.*
Where Proſecution may be by Clerk of Peace, or in another County. *ib.*

In the Northern Counties. - § 87.

Taking Money, Corn, Cattle, or other Conſideration called Blackmail, Felony without Clergy by Stat. 43 Eliz. c. 13. *ib.*
And Clergy is alſo taken away by Stat. 18 Car. 2. c. 3. from great and notorious Thieves, and Spoil takers in Cumberland and Northumberland. *ib.*

(*Of whoſe Property.*)

VI. *To whom the Property ſtolen ſhall be charged to belong.* - - - § 88.

Goods of Perſons unknown. *ib.*

Goods of a Church. Corpſe, &c. - - § 89.

Of Inteſtate before Adminiſtration. Of Executor before Probate. *ib.*

Special Property or Poſſeſſion. - - § 90.

In Bailee, Carrier, Innkeeper, Waſher, Agiſter, Stage Coachman; Indictment may lay Property either in ſuch or the Owners. *ib.*

And even againſt Owner ſtealing from ſuch Bailee, &c. *ib.*

Where Property may be laid in Servant. *ib.*

Property not changed by Larceny. *ib.*

Childrens' Cloaths, &c. laid either as their Property or that of Parents. - - § 91.

Property in truſt for Children. *ib.*

VII. *What is ſuch Evidence of the taking and carrying away being fraudulent or wrongful, and with Intent to convert the Goods to the Taker's own Uſe, and make them his own without Conſent of the Owner, as amounts to Felony.* § 92.

Felonious Intent muſt exiſt at the Time of the taking. *ib.*

Different Defences.

1. *Evidence on Denial of Fact.* - - § 93.

Length of Time. Nature of Property. Vicinity to the Spot. Behaviour. Identity of Property. Concealment. *ib.*

Confeſſion. - - - § 94.

Where excluded from Evidence, on Promiſe or Threat. *ib.*

2. *On Claim of Right.* - - - § 95.

On a Taking by the Party's own Act; as of Corn mixed, Cloth or Boards, &c. converted into other Forms, no Felony. *ib.*

So taking on any reasonable Pretence of Title, however ill founded, if not urged as a Pretext for stealing. § 95.

On taking by Act of Law. - - § 96.

No Excuse if procured by Fraud, and with Intent to steal. *ib.* As by fraudulent Replevin, or Ejectment without Pretence of Title. *ib.*

3. *On taking by Mistake or Accident.* - § 97.

Rebutted by shewing Knowledge and Intent to deceive or conceal. *ib.*

4. *On taking as a Trespasser.* - - § 98.

i. e. without Fraud, or openly before others, other than by apparent Robbery. *ib.*

As taking Plough and returning it. Taking Goods and paying more than the Value. Q. *ib.* Aliter where Money offered as a Colour for Fraud. *ib.*

Evidence of taking one Thing as a Trespasser upon Assault with Intent to steal another. *ib.*

Evidence of taking a Horse as a Trespasser with Intent to use it on a Journey as far as it would go, and there leave it without returning it to the Owner. *ib.*

5. *On Finding.* - - - § 99.

No Felony to take Goods lost; but this not to be urged as Pretence, where there is Knowledge of the Owner, or the Goods in a proper Place. *ib.*

Stealing Box left in a Hackney Coach. *ib.*

6. *On Delivery by a third Person.* - - § 100.

Probable Grounds for such Defence. *ib.*

7. *Taking on Delivery by or on Behalf of the Owner, or by his Consent or Approbation.* - - - § 101

i. No Larceny if the taking be not *invito domino*. *ib.*

Going out on Purpose to be robbed in Conspiracy with some of the Robbers; held no Offence in the others, though ignorant of it. *ib.*

Aliter where Party went *bonâ fide* with a View to apprehend them. *ib.*

Or acted in confidence with one who had apparently consented, but had revealed the Design, with Intent to detect the others. *ib.*

ii. Distinction between *Property*, or *Possession* only passing by Delivery. - - - § 102.

No

iii. *No Felony if Property transferred, though Transfer induced by Fraud.* - - - - § 103.
As obtaining Delivery of Horſe ſold, on Promiſe to return immediately and pay for it; but not returning. *ib.*
So obtaining Money by Fraud, under the Appearance of fair Betting. *ib.*
Or obtaining Goods under Pretence of paying for them, and giving Vendor's Servant Bills of no Value. *ib.*
So obtaining Credit in the Name of another for Silver, on Pretence of ſending Gold in exchange preſently, no Felony. - - § 104.
Nor getting a Loan by writing a Letter in another's Name. *ib.*
Aliter obtaining Goods from another's Servant by uſing a falſe Name, he having no diſpoſing Power. *ib.*
iv. *Taking before Sale complete.* - - § 105.
Felony, though the Goods ſet apart while Owner looked for others, but not agreed for or delivered. *ib.*
v. *On Delivery for the Purpoſe of diſcounting.* - § 106.
If the Diſcount agreed to be paid at the Time, and the Owner did not intend to truſt the Party with the Bill without receiving the Diſcount; held Felony in the latter to run away with the Bill without paying, with Intent to convert it to his own Uſe. *ib.* The ſame as where a Tradeſman delivers Goods to a Cuſtomer who pretends that he wants to buy them for ready Money, and afterward runs off with the Goods without Payment. *ib.*
vi. *On Delivery by way of Pledge, or Security.* § 107.
The Property ſtill remains in the Owner, and Larceny may be committed if Delivery obtained fraudulently and with Intent to ſteal. *ib.* As by pretending to find a Ring of Value, and inducing another to pledge Things of Value on depoſiting it with him till his Share could be paid of the pretended Jewel. *ib.*
So where the Pledge was of Money to be returned again. *ib.*
vii. *Different Kinds of Poſſeſſion the Subjects of Larceny.* § 108.

General Rules, as to Delivery by way of *Charge, general Bailment*, or *for a ſpecial Purpoſe.* - § 108.
viii. *Poſſeſſion by way of Charge.* - - § 109.
As in caſe of Servants or Workmen, or by way of *ſpecial Uſe*, as in caſe of Gueſts, the Subject of Larceny. *ib.*
So if a Banker's Clerk purloin Money out of a Drawer to which he has Acceſs. *ib.*
So of Poſſeſſion in the Owner's Preſence for a ſpecial Purpoſe. - - - § 110.
ix. *Poſſeſſion upon general or ſpecial Bailment.* § 111.
What a Bailment. *ib.*
Larceny may be committed by Bailee, if Bailment obtained fraudulently with Intent to ſteal. § 112.
Such Intent to be found by the Jury. *ib.*
Hiring Horſe on Pretence of a Journey, with Intent to ſteal, and evidencing ſuch Intent by immediately ſelling it, held Larceny. *ib.*
Though Poſſeſſion obtained in another's Name. *ib.*
Diſtinction between theſe Caſes and Caſes within the Statutes 33 H. 8. c. 1. and 30 Geo. 2. c. 24. *ib.*
So though Poſſeſſion of a Chaiſe were obtained on Pretence of hiring for three Weeks or a Month, for a Journey, and the Party ſet off, and was not heard of till a Year after when he was apprehended, and no Account given of the Chaiſe: held Evidence of a wrongful Converſion and an original Taking with Intent to ſteal. *ib.* Aliter if felonious Intent originated after the firſt Taking on Hire. *ib.*
Review of the Caſes. - - § 113.
x. Larceny may be committed, notwithſtanding a lawful Bailment, *after Privity of Contract determined.* § 114.
As by Lapſe of Time. *ib.* By Completion of the Service. *ib.*
But where one who aſſiſted in reſcuing another's Goods from a Fire, in his Preſence but without his Deſire, and who afterwards concealed and denied having them, was found to have taken them honeſtly at firſt, and that the evil Intention aroſe afterwards, held no Larceny. *ib.*

xi. *Larceny may be committed by a tortious Converſion pending a Bailment.* - - - § 115.
By Carrier breaking a Package delivered to him to carry, and taking out Goods. Aliter upon mere Evidence of Non-delivery. *ib.*
So Miller taking Part of the Corn ſent him to grind. *ib.*
xii. *Concluſion* as to Evidence of felonious Intent upon a Delivery by Owner. - - § 116.
8. *On a Taking through Neceſſity.* - § 117.
No legal Defence, though it exiſt in Fact. *ib.*
But conſiderable in Apportionment of Puniſhment. *ib.*

Larceny from the Perſon. - § 118.
Introduction. *ib.*

Clam et Secrete, by Stat. 8 Eliz. c. 4. § 119.
Feloniouſly taking Money, Goods or Chattels from the Perſon of another *privily without his Knowledge* in any Place, ouſted of Clergy. *ib.*
The Stat. confined to the Actor, and extends not to Aiders and Abettors. - - § 120.
There muſt be a Taking from the Perſon, and not in his Preſence only. *ib.*
Value muſt be above 12d. to ouſt Clergy. *ib.*
What a Taking "*privily without his Knowledge.*" § 121.
1. *As to the Manner:* it muſt be ſecret or ſudden, without Terror or open Violence. *ib.*
But Clergy not ouſted if done openly before the Party without Force or Terror. *ib.*
2. *As to the Situation of the Perſon robbed.* - § 122.
The Stat. extends not to ſuch as expoſe themſelves to ſuch Loſs by their own Negligence or Miſconduct; as being drunk and aſleep in the Streets. *ib.* Unleſs it happen by the Contrivance of the Thief. *ib.*
But the Maſter of a Veſſel aſleep in his Cabin is within the Protection of the Stat. *ib.*
So a Waggoner aſleep in the Stables of the Inn Yard. *ib.*
Aliter where Party being drunk was picked up in the Street by a Woman of the Town, and carried to her

her Lodgings, where he fell aſleep; and in that State ſhe picked his Pocket. - - § 122.

Indictment and Verdict. - - § 123.

Indictment muſt purſue Words of the Statute, but need not conclude contra formam, &c. *ib.* Priſoner may be convicted of ſimple Larceny only. *ib.*

Robbery (properly ſo called). § 124.

Definition.

A felonious taking of Money or Goods to any Value, from the Perſon, by Violence or putting in Fear. *ib.*

Value immaterial. - - § 125.

What a Taking *from the Perſon.* - § 126.

Taking in his Preſence ſufficient. *ib.*

Violence or Fear neceſſary. - - § 127.

But either ſufficient. *ib.*

1. *By Violence*, of what Kind. *ib.*

Not any ſudden ſnatching, unleſs with Injury to the Perſon, or with Reſiſtance and Struggling. *ib.*

Seizing Proviſions in a Cart driven by the Owner, under Pretence of want of Permit; Robbery. *ib.*

So an Officer taking Money from a Priſoner handcuffed in his Cuſtody without her Conſent, under Pretence of letting her go Home, and of paying for Coach-hire and Liquor which he himſelf had ordered; though both before and after he took the Money ſhe had offered to give it him if he would let her go Home; the Jury finding that the Whole was done with a felonious Intent to get her Money. *ib.*

2. *By Fear.* - - - - § 128.

Sufficient if reaſonable Grounds for it from Circumſtances of Terror, Threat, or Aſſault. *ib.*

Colourable Gifts extorted by Fear; Robbery. *ib.*

Though offered to make the Priſoner deſiſt from Rape. *ib.*

So compelling Owner to ſell Goods at leſs than their Value. *ib.*

Of what Nature the Fear may be. - § 129.

It muſt be ſuch as in Reaſon and common Experience will induce Owner to part with Property againſt his Will. *ib.*

Robber

Robbers ſwear one to bring them Money, which he does under a continuing Fear; held ſufficient. § 129.
So extorting Money by Threat to charge with an unnatural Crime. - - - § 130.
Though the Threat were to charge the Party before a Magiſtrate. *ib.*
(General Conſideration of the Queſtion. *ib.*)
And though the Party deliver his Money from Fear alone of his Character, and from no other Fear. *ib.*
So obtaining Money on Threat to come with a Mob and burn Dwelling-houſe. - § 131.
Or to tear down Mows of Corn and level Houſe. *ib.*
But paying Money under the Fear of being ſent to Priſon, which was threatened for not paying for a Lot charged to have been bid for at a pretended Auction, held not ſufficient Ground of Terror to conſtitute Robbery, being only ſimple Dureſs. *ib.*
So if Party deliver Money on a threatened Charge of Sodomy, without Fear for his Perſon or Character, but only with a View to the Conviction of the Offender; no Robbery. - - § 132.
The Fear muſt exiſt at the Time of the Property taken. Taking firſt by Stealth, and then uſing Menace on Diſcovery, no Robbery. - - § 133.

Of Grand and Petit Larceny, and Robbery, and their Puniſhments.

1. *Grand and Petit Larceny.* - § 134.
Value of Property ſtolen muſt be above 12d. to make Grand Larceny. *ib.*
Judgment of Death at common Law in Grand Larceny, but Offender entitled to Benefit of Clergy, unleſs ouſted by Statute. *ib.* Alſo Forfeiture of Goods. *ib.*
Judgment of Whipping and Impriſonment at common Law in Petit Larceny, and Forfeiture of Goods on Conviction. Alterations in both Caſes by Stat. *ib.*
Stat. 3 W. & M. c. 9. ſ. 2. extends former Statutes ouſting Clergy to Caſes of ſtanding mute, &c. § 135.

In clergyable Larcenies by Stat. 18 Eliz. c. 7. ſ. 3. Impriſonment not exceeding a Year. § 135.

And by Stat. 5 Ann. c. 6. the Offenders beſides being burned in the Hand may be ſent to hard Labour in Houſe of Correction, &c. for not leſs than 6 Months, nor exceeding 2 Years. *ib.*

When taking at ſeveral Times, or by ſeveral Perſons, and of different Owners, ſhall be ſaid to be Grand or Petit Larceny. - - § 136.

The Jury ought always to find the Value of the Goods ſtolen. - - - § 137.

2. *Robbery.* - - - - § 138.

Clergy ouſted in all Caſes of Robbery from the Perſon by Stat. 3 W. & M. c. 9. ſ. 1. and other Statutes, as well from Acceſſaries before as Aiders and Principals. *ib.*

But not Acceſſaries after. *ib.*

Statutes 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. and 3 W. & M. c. 9. ouſts Clergy on Indictment for Larceny in one County of Goods obtained by Robbery or Burglary in another. - - § 139.

Principals, Acceſſaries, and Receivers.

1. *Principals and Acceſſaries* governed by general Rules. § 140.

Except as to ouſting of Clergy in particular Caſes of aggravated Larcenies, which extends not to Aiders and Abettors. *ib.*

In Petit Larceny no Acceſſaries, but all are Principals. *ib.*

2. *Receivers* of ſtolen Goods made Acceſſaries after the Fact by Stat. 3 W. & M. c. 9. ſ. 4. and 5 Ann. c. 31. ſ. 5. - - § 141.

And may be tranſported by Stat. 4 Geo. 1. c. 11. ſ. 1. *ib.*

Petit Larcenies not included therein. *ib.* But this aided by Stat. 22 Geo. 3. c. 58. *ib.*

At common Law, receiving ſtolen Goods only a Miſdemeanor: but afterwards merged in Felony. § 142.

Wherefore

Wherefore by the rule of the common Law Receiver could not be tried before Conviction of Principal. § 142.

But now he may, by Stat. 1 Ann. ſt. 2. c. 9. ſ. 2. though the Principal be not convicted; and by Stat. 5 Ann. c. 31. ſ. 6. though he be not taken. *ib.*

But where Principal amenable to Juſtice at the Time, Receiver ought on the ſaid Statutes of Ann. to be proſecuted for Felony. *ib.*

Aliter if not *then* amenable; though he had been before taken and afterwards eſcaped by the Neglect of the Proſecutor. *ib.*

Puniſhment on Miſdemeanor diſcretionary, as in other Caſes. *ib.*

But by Stat. 22 G. 3. c. 58. Receivers (except of certain Goods provided for by Stat. 29 Geo. 2. c. 30.) may be proſecuted for Miſdemeanor in all Caſes, whether of Grand or Petit Larceny, whether Principal amenable to Juſtice or not, except where Principal has been before convicted of Grand Larceny or ſome greater Offence. *ib.*

Perſons concealing ſtolen goods in their Dwelling-houſes, &c. or having ſuch found in their Cuſtody, and being privy thereto, guilty of Miſdemeanor. *ib.*

What Goods and Chattels within the Statutes. § 143.

Not Money. *ib.* Qu. Bank Notes. *ib.*

3. Proviſion againſt *Receivers of particular Goods ſtolen.* § 144.

i. *Receivers of ſtolen Lead, Iron, Braſs, Copper, Bell-metal, and Solder*, tranſportable for 14 Years by Stat. 29 Geo. 2. c. 30. ſ. 1. *ib.*

ii. Extended to *Pewter* by Stat. 21 Geo. 3. c. 69. with Tranſportation for 7 Years, or Impriſonment and Whipping. *ib.*

Conſtruction thereon. *ib.*

iii. Receiving Goods ſtolen from *Ships in the Thames*, Tranſportation by Stat. 2 Geo. 3. c. 28. ſ. 12. § 145.

iv. Receiving ſtolen *Jewels, Gold, Silver, Plate, Watches, &c.* Felony and Tranſportation by Stat. 10 Geo. 3. c. 48. - - - § 146.

What a Jewel within the Act. *ib.*

v. Receiving *Woollen, Linen, and Cotton Goods.* § 147.
vi. *Garden Plants,* &c. *ib.*
vii. *Wad, Black Lead,* &c. *ib.*
viii. Receiving *Naval and Military Stores* of the Crown. § 148.

By Stat. 9 & 10 W. 3. c. 41. no ſuch Stores except for the King's Uſe ſhall have the King's Mark. *ib.*

Perſons in whoſe Cuſtody ſuch Stores are found, or who ſhall conceal them, forfeit the ſame and 200l., and ſhall be impriſoned till Payment. *ib.*

Stat. 1 Geo. 1. ſt. 2. c. 25. gives ſummary Juriſdiction to puniſh ſuch Embezzlements. *ib.*

Stat. 9 Geo. 1. c. 8. gives Juriſdiction to mitigate Penalty and commit to Gaol, &c. *ib.*

Court ſhall ſettle Diſpute as to Shares of Penalties, &c. *ib.*

By Stat. 17 Geo. 2. c. 40. Judges at the Aſſizes, &c. may impoſe Fine not exceeding 200l. for any Offence within Stat. 9 & 10 W. 3. c. 41. and 9 Geo. 1. c. 8. and may mitigate, &c. or inflict corporal Puniſhment in lieu of Fine. *ib.*

Stat. 39 & 40 Geo. 3. c. 89. for preventing Embezzlement of King's Naval, Ordnance, and Victualling Stores. - - - - § 149.

Whoever (except Contractors) ſhall knowingly ſell, or deliver, or receive, or have in Poſſeſſion any ſuch Stores in raw State or new, or only one-third worn, or ſhall conceal the ſame, ſhall be deemed a Receiver of ſtolen Goods, and be tranſported for 14 Years. *ib.*

Unleſs he produce Certificate from Commiſſioners, &c. *ib.*

Perſons in whoſe Cuſtody ſhall be found Canvas or Buntin marked, &c. or who ſhall be convicted of Offences contrary to Stat. 9 & 10 W. 3. relating to warlike Stores, &c. ſhall ſuffer corporal Puniſhment, beſides the Fine of 200l., which may be mitigated. *ib.*

Contractors only exempted for Poſſeſſion of Stores made for the Crown. *ib.*

Defacing Marks on King's Stores Felony and Tranſportation for 14 Years. - - § 150.

Perſons not tranſported for firſt Offence againſt Stat. 39 & 40 Geo. 3. and guilty of ſecond Offence againſt that or the Stat. 9 & 10 W. 3. ſhall be tranſported for 14 Years. - - - - § 151.
Returning from Tranſportation before Term expired, Death. *ib.*
Court may commute Tranſportation for corporal Puniſhment and Fine. *ib.*
Reward on Diſcovery of Offenders. - § 152.
Search Warrant. *ib.* Summary Juriſdiction over certain Miſdemeanors. *ib.* Not to prevent Proſecutions againſt Receivers, &c. ſo as Party be not twice puniſhed, &c. *ib.*
What ſhall be ſaid to be a *receiving* or *having in Poſſeſſion* under theſe Acts. - § 153.
A bare receiving malo animo, though without Intereſt in the Goods. *ib.*
Buying at under Value Evidence of Knowledge of the Felony. But not where one becomes poſſeſſed by Act of Law without Fraud. *ib.*
Whether one who *had* Stores in his Poſſeſſion at the paſſing of the Stat. 39 & 40 Geo. 3. c. 89. but *received* them before it be within the Act. *ib.*
4. *Diſtinction between Accomplice and Receiver.* § 154.
5. *Taking Reward for helping to ſtolen Goods*, Felony, and puniſhable the ſame as original Offence by Stat. 4 Geo. 1. c. 11. ſ. 4. - - § 155.
Whether the Offender may be *tried* before the Principal. *ib.*

Trial. - § 156.

Trial of Larceny may be in any County where the Thief is in Poſſeſſion of the Goods; but Indictment for Robbery can only be where the Force or Fear was. *ib.*
But where original Taking was out of Juriſdiction of common Law, there can be no Larceny. *ib.*
As at Sea; or in Scotland till Stat. 13 Geo. 3. c. 31. ſ. 4. gave Juriſdiction. *ib.*
The latter Stat. extends to Receivers. *ib.*

Plundering Wrecks in Wales triable in next adjoining Engliſh County where the King's Writ runs. § 156.
This does not include Cheſhire. *ib.*
So where Fact happens in an Engliſh County. *ib.*
In *aggravated Larcenies* all the Circumſtances of Aggravation muſt be proved in County where Indictment laid, otherwiſe clergyable. - - § 157.
Except by Stat. 25 H. 8. c. 3. where, on Indictment for Larceny in one County, the Goods appear *by Evidence or Examination* to have been obtained by Burglary or Robbery in another County; in which Caſe Clergy ouſted. *ib.* Extended to Outlawry, &c. by Stat. 3 W. & M. c. 9. ſ. 3. *ib.*
And to Goods obtained by any other Manner in any other Shire in which Clergy would be there ouſted. *ib.*
But not to Larcenies ouſted of Clergy by ſubſequent Statutes. *ib.*
Nor to Acceſſaries or Appeals. *ib.*
Nor to Trials for Larcenies in any Juriſdiction inferior to Counties. Semble. *ib.*
The Offender muſt have had the Goods in the County in which he is indicted for the Larceny. *ib.*
And if not more than 12d. Value, Clergy not ouſted thereon, though obtained by Robbery, &c. in another County. *ib.*
What is meant by appearing *on Evidence or Examination, &c.* - - - § 158.
Not neceſſary, though uſual, to enter on the Record that it appeared on ſuch Evidence not to be a clergyable Felony. *ib.*
But ſemble ſufficient if Averment of the Goods obtained by Robbery in another County and Plea of guilty. *ib.*
Inſtances of capital Convictions on theſe Statutes. *ib.*
What Evidence ſufficient to ouſt Clergy. *ib.*
Qu. Whether neceſſary to ouſt Clergy by Counterplea. *ib.*

Indict-

Indictment, Evidence, and Verdict.

1. *In Larceny.* Form of *Indictment.* - § 159.
i. *In Simple Larceny,* muſt ſtate the general Deſcription of the Goods ſtolen. *ib.* Quantity (where neceſſary). *ib.* Value. *ib.* To whom belonging. *ib.* A Taking and carrying away. *ib.* And Fact done *feloniouſly. ib.*
Indictment for Grand Larceny may have Judgment of Petit Larceny, but not of Treſpaſs. *ib.*
ii. In *aggravated Larcenies.* - - § 160.
Muſt ſtate the ſubſtantial and diſtinguiſhing Facts in order to ouſt Clergy. *ib.*: But if Proof fail as to thoſe, Conviction may be of ſimple Larceny, though laid contra formam Statuti. *ib.*
So Indictment may include ſeveral capital Charges; and Proof of any one will ouſt Clergy. *ib.*
Indictment for Larceny or Robbery in Houſes, &c. how laid and proved. - - § 161.
iii. For Larcenies of *particular Goods,* or by *particular Perſons* before enumerated. - § 162.
iv. Againſt *Receivers* of ſtolen Goods. - § 163.
Need not allege Time and Place to the Larceny, but only to the Receipt. *ib.*
May charge the Principal to be unknown. *ib.*
Sufficient if the Receipt appear to be of the ſame Goods ſtolen, though differently denominated. *ib.*
Muſt ſtate the Receipt to be made knowing of the Felony. *ib.*
But Poſſeſſion alone of naval Stores, &c. of the King with the King's Marks ſufficient by Statute. *ib.*
Indictment ſufficient for *a Miſdemeanor,* though principal Offence only Petit Larceny. - § 164.
And not neceſſary to aver that Principal not convicted. *ib.*
Though if ſo proved, it acquits of the Miſdemeanor. *ib.*
So it need not aver that Principal could not be taken. *ib.*
Sufficient to allege *Conviction* (without Attainder) of Principal for principal Offence, and ſubſequent Receipt of Goods with Knowledge. - § 165.

The Principal may be a *Witneſs* againſt the Receiver. § 166.
2. *In Robbery.* Indictment, general Form. § 167.
Charges Aſſault on Perſon, and taking by Violence, *or* by putting in Fear. *ib.* Aſſault to be laid *feloniouſly*. *ib.*
Conviction may be of ſimple Larceny. *ib.*
Allegation of Place not material, ſince Clergy ouſted from Robbery in general. - - § 168.
3. Form of *Appeal* of Larceny and Robbery. § 169.
By whom maintainable. *ib.*
In what County. *ib.* And in what Time. *ib.*

Reſtitution of ſtolen Goods. - - § 170.
1. By Appeal of Larceny or Robbery. *ib.*
2. By Stat. 21 H. 8. c. 11. on Indictment. § 171.
Writ of Reſtitution diſuſed. *ib.*
3. By common Law. - - § 172.
4. By Stat. in particular Inſtances. - § 173.

For other Matters, *vide* general Heads. Reward, Pardon, &c.

Larceny and Robbery.

§ 1. Introduction.

THE offence of feloniouſly taking the perſonal property of another is denominated either Larceny where the fact is accompliſhed ſecretly, or by ſurpriſe or fraud; or Robbery where accompanied by circumſtances of violence, threats, or terror to the perſon deſpoiled. Theſe two offences, which in their nature are intimately connected, the one being included in the other, are alſo in part blended together by the ſtatute law: this will lead to the joint conſideration of them in ſeveral particulars, which will be pointed out in their proper order. It is propoſed to treat

Diviſion of the ſubject.

I. *Of Simple Larceny, its Definition, and an Illuſtration of the component Parts of ſuch Definition: In the Courſe of which will be noticed the Variations which have from Time to Time been introduced by Statute.*

II. *Of*

II. *Of Larceny clam et ſecrete from the Perſon.*
III. *Of Robbery properly ſo called.*
IV. *Of Grand and Petit Larceny and Robbery with their ſeveral Puniſhments.*
V. *Of Principals, Acceſſaries, and Receivers.*
VI. *Of the Trial, Indictment, Appeal, Evidence, and Verdict.*
VII. *Of Reſtitution of ſtolen Goods.*

I. As to the firſt head of inquiry,

§ 2.

Definition of Larceny. 3 Inſt. ch. 47. Tracy's MS. 66. Britt. ch 15. fo. 22. 1 Hawk. ch. 33. ſ. 1. Sum. 60. 1 Hale, 504. 4 Blac. Com. 229. Foſt. 123, 4. Staundf. 24.

Lord Coke, and after him moſt others, have defined ſimple larceny to be the felonious and fraudulent taking and carrying away, by any perſon, of the mere perſonal goods of another, neither from the perſon, nor by night in the houſe of the owner. Perhaps it may with as much propriety be defined at large to be, *the wrongful or fraudulent taking and carrying away by any perſon of the mere perſonal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own uſe, and make them his own property, without the conſent of the owner.* Thus Bracton defines it to be contrectatio rei alienæ, fraudulenter, cum animo furandi, invito illo domino cujus res illa fuerit. And Mr. Juſtice Blackſtone ſays, that the taking muſt be felonious, that is, done animo furandi, or as the civil law (*a*) expreſſes it, lucri cauſâ. On the debate in Pear's caſe, Eyre B. defined larceny to be "the wrongful taking of goods with intent to ſpoil the owner of them cauſâ lucri."

Bract. lib. 3. c. 32. 4 Blac. Com. 232.

Poſt. f. 112.

Conſtituent parts of larceny.

In the examination of this ſubject it will be neceſſary to conſider

1. *What is a mere taking;*
2. *What a carrying away;*
3. *By what perſon;*
4. *Of what things;*
5. *From what place;*
6. *To whom belonging:*
7. *What is ſuch evidence of the taking and carrying away being wrongful or fraudulent and with intent to convert the goods*

(*a*) By the civil law (which ſeems to go further than the common law) furtum eſt contrectatio fraudulosa lucri faciendi cauſâ, vel ipſius rei, vel etiam uſus ejus poſſeſſionisve. Juſt. Inſt. lib. 4. tit. 1.

Ch. XVI. § 2.

to the taker's own use, and make them his own property, without the consent of the owner, as will amount to felony.

§ 3. *What is a taking.*

I. *What is a mere taking of Goods.*

It is not here intended to consider the taking as connected with the felonious intent, because that will be more conveniently examined under the 7th head of inquiry: but what sort of taking possession is in fact requisite to support a charge for larceny. As to which, there must be an actual taking or severance of the thing from the possession of the owner; for as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he cannot be guilty of felony in carrying them away. Hence it is that if the party obtain possession of the goods lawfully, as upon a trust, for or on account of the owner, by which he acquires a kind of special property in them, he cannot afterwards be guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest, with intent to convert them to his own use, he thereby determines the privity of the bailment and the special property thereby conferred upon him; in which case he is as much guilty of a trespass against the virtual possession of the owner by such second taking, as if the act had been done by a mere stranger.

Actual severance necessary. 1 Hawk ch. 33. s. 2. 2 MS. Sum. 231.

1 Hale, 504. & post. s. 108, &c.

Privity of bailment determined. 1 Hale, 505. 1 Hawk. ch. 33. s. 5. 7. Post. s. 114.

A bare charge of goods, such as that which is committed to a servant over the goods of his master, or a mere liberty to make use of a thing for a particular purpose, such as a guest at an inn has of the furniture, &c.; inasmuch as it does not in law convey even the possession of the goods, much less any special property in them to such servant or guest, furnishes no objection to a charge of felony if either take or convert them to his own use. But this is only mentioned for the present in order to obviate any difficulty which may seem to arise from imputing a charge of *taking* that which at first sight appears to have been in his lawful possession before.

On a bare charge of goods. 1 Hale, 506. 1 Hawk. ch. 33. s. 6. Sum. 61. 2 MS. Sum. 230. Post. s. 109.

In like manner, though the possession be delivered by the owner for a particular purpose, yet if it be obtained by any fraud it amounts to a tortious taking, in the same degree as if the party had taken it without any delivery at all from the owner.

Possession by fraud. MS. Chapple. 2 MS. Sum. Post. s. 112.

owner. Though otherwiſe if the delivery be obtained on a truſt without fraud. The books abound with examples of this ſort of larceny, which will be noticed in their place. Ch. XVI. § 3. *After bailment.* 1 Hale, 504.

So a colourable gift, which in truth was extorted by fear, amounts to a taking and treſpaſs in law; and has often been holden to conſtitute robbery, as will hereafter be ſhewn: and this though the thing obtained were not originally in the contemplation of the robber, but received as the price of deſiſting from a felonious attempt of another kind. But the taking in all caſes muſt be againſt or without the conſent of the owner to conſtitute robbery or larceny. *Colourable gift.* 1 Hale, 533. Poſt. f. 128. Blackham's caſe, poſt. f. 128. Poſt. f. 101.

But although there muſt be a taking in fact from the actual or conſtructive poſſeſſion of the owner, yet it need not be by the very hand of the party accuſed. For if he fraudulently procure another who is himſelf innocent of any felonious intent to take the goods for him, it will be the ſame as if he had taken them himſelf; and the taking muſt be charged to be by him. As if one procure an infant within the age of diſcretion to ſteal goods for him; or if by fraud or perjury he get poſſeſſion of goods by legal proceſs without colour of title. This has been already and will be further illuſtrated hereafter. The caſe of accomplices or acceſſaries falls under a different conſideration. *Taking by another hand.* 1 Hawk. ch. 33. ſ. 8. 1 Hale, 507. 3 Inſt. 108. Poſt. f. 96. *Vide* tit. Burglary, ante, p. 485.

Other inſtances will be adduced in the following ſection where the taking and carrying away are blended as it were in the ſame act.

2. *What ſhall be deemed a carrying away.* § 4. *Carrying away.*

The leaſt removal of the thing taken from the place where it was before is a ſufficient aſportation though it be not quite carried off. 1 Hawk. ch. 33. ſ. 18. 4 Blac. Com. 231. 3 Inſt. 108, 109. 2 MS. Sum. 238, 239, 240. Kel. 31.

Upon this ground the gueſt, who having taken off the ſheets from his bed with an intent to ſteal them carried them into the hall, and was apprehended before he could get out of the houſe, was adjudged guilty of larceny. So alſo was he, who having taken a horſe in a cloſe with intent to ſteal it, was apprehended before he could get it out of the cloſe. And ſuch was the caſe of him who, intending to 1 Hale, 508. 27. Aſſ. 39. *Removal from the place.*

Ch. XVI. § 4. *Removal.*

ſteal plate, took it out of the trunk wherein it was, and laid it on the floor, but was ſurprized before he could remove it any further.

Henry Cozlett's caſe, O B Feb. 1782, and Eaſter term 1782. MS. Crown Caſ. Ref. and MS. Buller J. (S. C. Leach, 204. laſt edit. 271.)

So where the priſoner took up a parcel in a waggon and carried it from one end of the waggon to the other, with intent to ſteal it; although it was never taken out of the carriage, but he was ſeized in the fact; yet, by all the Judges, this was a ſufficient aſportation to conſtitute felony.

Cherry's caſe, Oxford, Lent Aſſ. 1781. and Eaſt. term 1781.

But where William Cherry was indicted for ſtealing a wrapper and ſome pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long ſquare, which was laid length-way in a waggon: That the priſoner ſet up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpoſe; but was apprehended before he had taken any thing: All the Judges agreed that this was no larceny; although his intention to ſteal was manifeſt. For a carrying away in order to conſtitute felony muſt be a removal of the goods from the place where they were; and the felon muſt for the inſtant at leaſt have the entire and abſolute poſſeſſion of them.

MS. Gould and Buller Js. 2 MS. Sum. 238. 240. and MS. Crown Caſ Ref.

Wilkinſon's caſe, 1 Hale, 508. MS. Burnet. Sum. 64.

One had his keys tied to the ſtrings of his purſe in his pocket, which Elizabeth Wilkinſon attempted to take from him, and was detected with the purſe in her hand; but the ſtrings of the purſe ſtill hung to the owner's pocket by means of the keys. This was ruled to be no aſportation: the purſe could not be ſaid to be carried away, for it ſtill remained faſtened to the place where it was before.

1 Hale, 533.

So where A. had his purſe tied to his girdle, and B. attempting to rob him, in the ſtruggle the girdle broke, and the purſe fell to the ground; B. not having previouſly taken hold of it, nor picking it up afterwards; it was ruled to be no taking.

Supra.

In the conference upon Cherry's caſe above referred to, Eyre B. mentioned a caſe before him, where goods in a ſhop were tied to a ſtring, which was faſtened by one end to the bottom of the counter. A thief took up the goods and carried them towards the door as far as the ſtring would permit, and was then ſtopped: this he held not to be a ſeverance and conſequently no felony.

Jame

Ch. XVI. § 4. *Removal.*

James Lapier was convicted of robbing Mrs. Hobart on the highway, and taking from her person a diamond ear-ring. The fact was, that as Mrs. H. was coming out of the opera-house she felt the prisoner snatch at her ear-ring and tear it from her ear, which bled, and she was much hurt: but the ear-ring fell into her hair; where it was found after she returned home. Judgment being respited for the opinion of the Judges, whether this were such a taking from the person as to constitute robbery; they were all of opinion that it was. It being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant: and it was taken by violence.

R. v. Lapier, O. B. May, 1784, MS. Gould J. Post. f. 127. (S. C. 1 Leach, 360.) Tr. T. 1784. *A momentary possession, though lost again in the same instant, the thing being found about the owner's person, is sufficient.*

But in the case of Edward Farrell, who upon an indictment for robbery was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him; on which the prosecutor laid the bed on the ground; but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended: the Judges were of opinion that the offence was not completed, and the prisoner was discharged.

Farrel's case, O. B. July 178?, Leach. 266. n. Post. f. 126.

§ 5. *Returning goods.* 1 Hale, 533. 3 Inst. 69.

If the thief once take possession of the thing, the offence is complete, though he afterwards return it. As if a robber finding little in a purse which he had taken from the owner, restore it to him again, or let it fall in struggling, and never take it up again, having once had possession of it.

Peat's case, O. B. 178?, cor. Hotham B. and Wilbs J. Leach, 200. (last edit. 266.)

Or as in Peat's case, who having robbed Mr. Downe of his purse returned it again, saying, if you value your purse take it back again, and give me the contents; but before Mr. D. could do this his servant secured the robber: the offence was ruled to be complete by the first taking.

§ 6. *Where distinct asportations by several.*

Where it is one continuing transaction, though there be several distinct asportations in law by several persons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods from the virtual custody

R. v. Dyer and Dilling, post. f. 154.

Ch. XVI. § 5. cuſtody of the owner; as will be ſhewn more fully in another place.

§ 7. *By whom.*

3. *By whom in particular Larceny or Robbery may be committed.*

The ſame excuſes of infanity, ideocy, coverture, and infancy, which prevail in other caſes of felony, will of courſe have place here: but theſe as far as they apply to other felonies are conſidered elſewhere.

Joint-tenants. 1 Hale, 513. & infra.

As to this offence in particular, it is to be noted that joint tenants or tenants in common of a chattel cannot be guilty of ſtealing the ſame from each other, becauſe the property and poſſeſſion is in both. But under ſome circumſtances a man may be guilty of larceny in ſtealing his own goods, or of robbery in taking his own property from the perſon of another. So he may be an acceſſary after the fact to ſuch larceny or robbery, by harbouring the thief or aſſiſting his eſcape. A. delivers goods to B. to keep for him, and then ſteals them, *with intent to charge B. with the value of them:* this is felony in A. So A. having delivered money to his ſervant to carry to ſome diſtant place, diſguiſes himſelf, and robs the ſervant on the road, *with intent to charge the hundred:* this is undoubtedly robbery in A. For in theſe caſes the money and the goods are taken from thoſe who have a temporary ſpecial property in them, with a wicked fraudulent intent, which is the ancient known definition of larceny: fraudulenta contrectatio rei alienæ invito domino. By the ſame rule the wife may ſteal the goods of her huſband bailed to another perſon.

Larceny of a man's own goods. Foſt. 123, 4. 1 Hale, 513, 514. 3 Inſt. 310. 1 Hawk. ch. 33. ſ. 30. 2 MS. Sum. 249. Staundf. 26. 4 Blac. Com. 231. Bro. Coron. 160. Poſt. ſ. 90.

1 Hale, 513.

§ 8. *By feme covert.* 1 Hawk. ch. 33. ſ. 19. Staundf. 27. 1 Hale, 514. 2 MS. Sum. 242.

But a feme covert cannot commit larceny of her huſband's goods from his own poſſeſſion, becauſe in law they are conſidered but as one perſon, and ſhe has a kind of intereſt in his goods. On which account not even a ſtranger can commit larceny of ſuch by the delivery of the wife, although he knew they were the huſband's goods; as he may by taking the wife by force and againſt her will, together with the goods of the huſband, by force of the ſtatute.

St. Weſtm. 2. c. 34. 1 Hale, 514. 2 MS. Sum. 238.

Nathaniel

Nathaniel Harriſon was indicted for ſtealing ſome plate: and it appearing that the proſecutor's wife had the conſtant keeping of the key of the cloſet where the plate was uſually locked up, and that the priſoner could not have taken it without her privity and conſent, (which appeared probable from other circumſtances; although no direct evidence of the fact could be produced;) the court thinking that it might be preſumed that he had received it from her, directed him to be acquitted; which was accordingly done. Ch. XVI. § 8. *By feme covert.* Harriſon's caſe, O.B. Feb. 1756, cor. Adams B. Denniſon, and Bathurſt Js. MS. (S. C. 1 Leach, 56.)

Neither can the wife commit larceny in the company of her huſband; for it is deemed his coercion and not her own voluntary act. Yet if ſhe do it in his abſence and by his mere command, ſhe is then puniſhable as if ſhe were ſole. And the huſband, it is ſaid, may be acceſſary to the wife in receiving her; though not the wife for the receipt of the huſband; a technical diſtinction for which there ſeems no juſt reaſon. Hawkins thinks ſhe is alſo liable if ſhe commit a robbery in company with her huſband. And even with reſpect to larceny, Lord Hale in one place ſays, it is only a preſumption in law till the contrary appears: for he was always of opinion that if upon the evidence it clearly appeared that the wife was not drawn to the offence by the huſband, but that ſhe was the principal actor and inciter to it, ſhe was guilty as well as the huſband. But in another part he ſays, that the contrary practice, which he thinks fitteſt to be followed, had prevailed. And I am not aware that the former opinion, however reaſonable it appears, has been acted upon in any modern inſtances, though the occaſion muſt have too often occurred. 2 MS. Sum. 241, 2. 1 Hale, 45. Staundf. 26. *Vide* general tit. *Perſons capable of Crimes.* 1 Hawk. ch. 1. ſ. 11. 1 Hale, 516. 1 Hale, 45.

However, if a wife be guilty of larceny in company with her huſband, both of them may be indicted: and if the huſband be convicted, the wife ſhall be acquitted. But if the huſband be acquitted, and it appear that the felony were by her own voluntary act, (by which muſt be underſtood that the huſband, if preſent, had no knowledge of or participation in the fact,) ſhe may upon the ſame indictment be convicted: for the charge is joint and ſeveral. And if a woman inſiſt that ſhe is the wife of the man in whoſe company the felony was done, ſhe may be indicted by her huſband's name and her own, with an alias, and the addition of ſpinſter; 1 Hale, 46. Kel. 37. 2 MS. Sum. 242. Semb. E.

Ch. XVI. § 8. *By feme covert.*

ſpinſter; and it will lie upon her to prove her coverture, or elſe ſhe may be found guilty.

§ 9. *By perſons having a uſe or charge. Vide* poſt. f. 14—18. 109.

With reſpect to larcenies at common law committed by ſervants and others entruſted with the uſe or charge of goods, I ſhall have an opportunity of conſidering them more fully hereafter. For the preſent I have to obſerve, that the legiſlature has thought it neceſſary to make ſpecial proviſion for them in ſeveral inſtances. And firſt, as to ſervants.

33 H. 6. c. 1. *Servants making ſpoil of their maſters' goods at their death.* 1 Hale, 515.

The ſtat. 33 H. 6. c. 1. reciting "that divers houſehold "ſervants of Lords or other perſons of good degree, ſhortly "after their maſters' deaths, violently and riotouſly have "taken and ſpoiled the goods which were of their ſaid "maſters at the time of their death, and the ſame diſtributed "amongſt them," &c. enacts, "that after full information "made to the Chancellor by the executors (or any two of "them) of ſuch Lord or perſon, of ſuch riot, taking, and "ſpoil made, &c. the ſaid Chancellor, by the advice of "the Chief Juſtices of B. R. and C. B., and the C. B. of the "Exchequer, or two of them, may make out writs to ſuch "ſheriffs as ſeem neceſſary, to make open proclamation (ſuch "as is thereby directed) for the ſaid offenders to appear be-"fore B. R. on the day limited by the writ, &c.; whereupon "if they make default, &c. they ſhall be attainted of felony: "but if they appear, they ſhall be committed or bailed until "they anſwer the ſaid executors in ſuch actions as ſhall be "brought againſt them for the ſaid riot, taking, and ſpoil-1 Hale, 515. 654. "ing," &c. In effect therefore, though if the party do not appear he ſhall anſwer for the offence as felony; yet if he appear, he may be ſued as for a treſpaſs. The ſtatute extends to one executor, if but one.

§ 10. *By ſervants embezzling goods committed to their charge.* 21 H. 8. c. 7. made perpetual by 5 Eliz. c. 10. *Vide* 1 Hale, 505. n.

The ſtat. 21 H. 8. c. 7. reciting that divers perſons had upon confidence and truſt delivered unto their ſervants their caſkets and other jewels, money, goods, and chattels, ſafely to keep to the uſe of the ſaid maſters, &c. and that they had afterwards withdrawn themſelves, and had gone away with the ſame or part thereof, or continuing with their maſter, &c. had converted the ſame or part thereof to their own uſe; and that it was doubtful whether this were felony or not at common

common law; enacts, "that all and singular such servants "(being of the age of 18 and not apprentices) to whom any "such caskets, jewels, money, goods or chattels, by his or "their said masters or mistresses shall from thenceforth so "be delivered to keep, that if any such servant or servants "withdraw him or them from their said masters or mis-"tresses, and go away with the said caskets, &c. or any part "thereof, with intent to steal the same, and defraud his or "their said masters or mistresses thereof, contrary to the "trust and confidence to him or them put by his or their "said masters or mistresses; or else being in the service of "his said master or mistress, without their assent or com-"mand, he embezzle the same caskets, &c. or any part "thereof, or otherwise convert the same to his own use, "with like purpose to steal it; that if the said caskets, &c. "that any such servant shall so go away with, or which he "shall embezzle with purpose to steal it as is aforesaid, be "of the value of 40s. or above; that then the same false, "fraudulent, and untrue act or demeanor from thence-"forth shall be deemed and adjudged felony," &c. and the offenders be punished as other felons are punished for felonies committed by the course of the common law.

Ch. XVI. § 10. *By servants within* 21 H. 8. c. 7.

By the stat. 27 H. 8. c. 17. clergy was taken away in this case: and it was made perpetual by stat. 28 H. 8. c. 2. and confirmed by stat. 1 Ed. 6. c. 12. s. 18. But both these acts were repealed by stat. 1 Mar. st. 1. c. 1. s. 5. (*a*) The stat. 21 H. 8. however was afterwards re-enacted and revived by 5 Eliz. c. 10.; but not the stat. 27 H. 8.; so that the party still had his clergy. But now by the stat. 12 Ann. c. 7. after-mentioned clergy is taken away if the offence be committed in a dwelling-house or outhouse thereunto belonging. It is said however that the offender is not transportable under the stat. 4 Geo. 1. c. 11. or 6 Geo. 1. c. 23. for that those statutes extend only to larcenies, and this is a breach of trust made felony by the stat. But I cannot subscribe to this opinion, at least to the full extent of it; for the stat. of H. 8. in effect only establishes what the common law had before provided for, which by the recital it appears had been before doubted; and says that the offences described shall be deemed felony,

(*a*) *Vide* 1 Hale, 666, which supposes the repeal to have been by the stat. 1 Ed. 6. c. 12 instead of the stat. of Mary.

2 MS. Sum. 237. post. f. 66. 81.

Post. f. 135.

Vide 4 Blackst. Com. 230.

Ch. XVI. § 10. *By servants within ſtat.* 21 H. 8. c. 7.

and the offenders puniſhed as other felons by the courſe of the common law. But even if this were doubtful, the words of the ſtat. 4 Geo. 1. c. 11. are large enough to reach this caſe; for it extends to perſons "convicted of grand or petit "larceny, *or any felonious ſtealing or taking* of money or "goods, &c. from the perſon or houſe of any other, or in "any other manner," &c.

§ 11. *What ſervants within ſtatute.* 1 Hawk. ch. 33. ſ. 12. Sum. 63. 2 MS. Sum. 234, 5. Crompt. Juſt. 50. Dy. 5. n. Dalt. ch. 58.

This ſtatute extends only to ſuch as were ſervants to the owners of the goods both at the time of the delivery and when they were ſtolen, and not at all to apprentices bound by indenture as ſuch, or to ſervants under 18 years of age. Therefore if A. deliver goods to B. to keep, and afterwards take him into his ſervice, and then B. run away with the goods, it is no felony under this ſtatute; becauſe not originally delivered under the ſpecial truſt of a ſervant.

Apprentices.

1 Hale, 668.

But notwithſtanding the exception as to apprentices, yet if any ſuch take his maſter's goods delivered to him by way of charge, or not delivered to him at all, he is guilty of felony at common law.

§ 12. *What goods within ſtatute.* 1 Hawk. ch. 33. ſ. 13. 2 MS. Sum. 234, 5. Dy. 5. 3 Inſt. 105. 1 Hale, 505.

The ſtatute is confined to ſuch goods as are delivered to keep for the uſe of the maſter, to be returned to him again. And therefore a receiver who runs away with his maſter's rents received by him for his maſter, or a ſervant who being entruſted to ſell goods or receive money due on a bond ſells the goods, &c. and departs with the money, is not within the ſtatute, becauſe he did not receive the money by delivery from his maſter. Yet this is doubted by Lord Hale for reaſons which will be mentioned preſently.

1 Hale, 668.

Watſon's caſe, Worceſter Sp. Aſſ. 1788, cor. Heath J. MS. Buller J. *No larceny in ſervant who embezzles money delivered to him to purchaſe goods with, either on the ſtatute or at common law; and qu. the latter.*

William Watſon was tried on an indictment, containing three counts; the 1ſt ſtating, that the priſoner as a ſervant received 3l. 18s. the money of E. Cowper his late maſter, which was delivered to him ſafely to keep to the uſe of his ſaid maſter; and that afterwards the ſaid priſoner withdrew himſelf from his maſter with the money, with an intent to ſteal the ſame, and to defraud his ſaid maſter thereof. The 2d count ſtated, that the priſoner having received the ſaid money in the manner above ſtated, and being with his maſter, had

had converted the same to his own use: and both concluded against the form of the statute. The third count was for larceny generally. It appeared that Cowper, who was a surrogate, had sent the prisoner, who was his servant, to buy some blank licences, and had delivered him the 3 l. 18 s. for that purpose; but the prisoner ran away with the money: and being convicted, a question was reserved for the opinion of the Judges, Whether the evidence supported any of the counts? and in East. term 1788 all the Judges but the Chief Baron held that this case was not within the stat., for to *keep* means to keep for the use of the master, and to return to him. As to the count for larceny, all the Judges held this could not be felony at common law; for to make it felony there must be some act done by the prisoner, a fraudulent obtaining of the possession with intent to steal. This last point however has been since denied to be law in Lavender's case.

Ch. XVI. § 12. *By servants within stat.* 21 H. 8. c. 7.

MS. Buller J. Post. f. 15.

The statute extends not to goods the actual property of which were not in the master at the time: and therefore it is said that if the property be changed, as by melting money down, or malting corn, and then it be taken away, it is not within the statute. But qu. Whether this be not stated too generally, where the design of embezzlement originated before the alteration of the thing? for if the whole act of the servant be taken together as it ought to be, the subsequent appropriation of the metal or the malt to his own use may be evidence of the felonious intent with which he took the money or the corn. But it is agreed, that if a servant make a suit of cloaths of cloth, or shoes of leather, or change one species of corn into another, which in their original state were delivered to him by his master to keep, he is within the statute, because the property is not altered.

1 Hawk. ch. 33. s. 15. 2 MS. Sum. 235. MS. Burnet, 63.

1 Hawk. ch. 33. s. 15. 2 MS Sum. 235. 1 Hale, 668.

But no wasting or consuming of goods is within the statute, however wilful.

1 Hawk. ch. 33. s. 14. Sum 63.

The delivery of such goods by another servant of the master is the same as a delivery by the master himself; and that even in his absence, if by his command. And therefore Lord Hale doubts the distinction between this case and receiving money from a creditor by the master's order. Yet it seems that the act of the creditor cannot on the particular wording

Goods delivered by another servant.

2 MS Sum. 235. 1 Hawk. ch. 33. s. 13. Dy. 5. Burnet's MS. 62. 1 Hale, 663.

Ch. XVI. § 12. *By ſervants within ſtat.* 21 H. 8. c. 7.

of the ſtatute be conſidered as the act of the maſter, as the act of another ſervant on behalf of his maſter may.

Value. Burnet's MS. 62. 3 Inſt. 105.

The value of the goods is to be computed as they would ſell.

§ 13. *Form of indictment.* 2 MS. Sum. 235. Dy. 5. Ante, p. 562.

5. All indictments upon the ſtatute againſt ſervants embezzling of goods delivered to them muſt charge that they feloniouſly *carried away*, and not that they feloniouſly *took* them; for the carrying away is the offence. It does not appear however that the words "*carried away*" are technically neceſſary; and in Watſon's caſe the two firſt counts proceeded upon other words of the ſtatute.

MS. Burnet, 62. *Sed vide* MS. Tracy, 206. contrà, which cites Cro. Car. 378.

It is ſaid that the indictment muſt not be vi et armis, which according to the caſe in Cro. Car. 378. it ought to be; but it ſeems well enough to lay it either way.

§ 14. *By ſervants at common law.* 1 Hale, 506. 668. 2 MS. Sum. 230, 1. MS. Burnet, 63. Bro. Coron. 160. Sum. 61. Crompt. 25. a. MS. Tracy, 60. 1 Hawk. ch. 33. ſ. 6. Staundf. 25. Poph. 84. Owen, 52. Moor. 248. and ſubſequent caſes. 1 Hale, 506. 667.

The above ſtatute however is but little reſorted to at this day; for notwithſtanding the inference which might at firſt ſight be drawn from it, it is a clear maxim of the common law, that where one has only the bare charge or cuſtody of the goods of another, the legal poſſeſſion remains in the owner, and the party may be guilty of treſpaſs and larceny in fraudulently converting the ſame to his own uſe. Thus a butler may commit larceny of plate in his cuſtody, or a ſhepherd of ſheep. The ſame of a ſervant entruſted to ſell goods in a ſhop. This rule appears to hold univerſally in the caſe of ſervants, whoſe poſſeſſion of their maſter's goods by their delivery or permiſſion is the poſſeſſion of the maſter himſelf. Lord Hale indeed does not appear to ſpeak with his uſual clearneſs on this point: for he ſeems to make a diſtinction in this reſpect, where goods are actually delivered or not by the maſter to the ſervant; that the latter is felony at common law, but not the former without the aid of the ſtat. of H. 8. Yet are not ſheep delivered to a ſhepherd, and plate to a butler? Or ſuppoſing a maſter delivered a new piece of plate with his own hand to his butler, would it make any difference in the law, ſo that the purloining of that particular piece would not be felony at common law as much as the reſt, of which there was only an implied charge given him? That Lord Hale himſelf wavered in the opinion juſt alluded to is very plain; for after ſtating the caſe of a

1 Hale, 668.

maſter's

master's delivering a bond to a servant to receive the money, or goods to sell, and the servant's going away with the money; which he says is not felony at common law, because the money is delivered to him, nor by the statute, because it was not delivered by the master; he adds, *and yet by the very payment of the money to the servant to the master's use, the master is by law said to be actually possessed of this money: and if taken away from the servant by a trespasser or robber, the master may have a general action of trespass or action upon the statute of hue-and-cry.* It seems more reasonable and consistent to consider that stat. in the nature of a declaratory law: and so it was holden to be by Gould J. in delivering the opinion of the Judges in Wilkins' case. Supposing this maxim to be well founded, it leads to an important difference between the case of servants and others: for if there be a delivery of goods by a master to his servant for a particular purpose, and instead of applying them accordingly he embezzle the whole or a part, it amounts to felony, although there be no evidence of a prior felonious intent at the time he received such goods; because even after such delivery to him the goods continued in the legal possession of the master and not of the servant; and therefore the act of converting them fraudulently is in law a tortious taking from the possession of the master. But it is otherwise in the case of a legal delivery to any other than a servant; for then unless such delivery were procured by fraud, and the jury find a previous felonious intent to convert the goods existing at the time of the delivery, a subsequent conversion is not felony; unless in those cases which will be pointed out hereafter, where the privity of contract is determined.

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Vide Aishcome v. The Hundred of Spelholme, 1 Show. 94. 241.

Post. f. 104.

Post. f. 114.

§ 15. *Modern cases.*

I cannot do better than refer to the several modern cases wherein the maxim of the common law touching larceny by servants has been fully recognized.

A carter going away with his master's cart was holden felony.

Robinson's case, O. B. Feb 1755. per Adams B. Wilmot J. Serjt. Forster's MS.

Francis Paradice was indicted for stealing a bill of exchange of 100 l. value, the property of William Periam. The prosecutor to whom the bill was indorsed was a draper at Devizes, and the prisoner, who was his book-keeper on a salary, kept his accounts, and received and paid money for him,

R. v. Paradice, Sarum Lent Ass. 1766, cor. Gould J. Serjt. Forster's MS. *One employed as a clerk in the day*

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him, but did not live in his houſe; but came every day there to tranſact his buſineſs. The proſecutor delivered the bill in queſtion, with ſeveral others, to the priſoner, and ordered him to ſend them by that day's poſt, as he had often done before, from the Devizes to the proſecutor's banker in London, as caſh to be accounted for to the proſecutor. The priſoner next day aſked the proſecutor's leave to go to a town in the neighbourhood, which was conſented to on condition that he returned the next day by 12 o'clock. The priſoner went to Saliſbury, got caſh for the bill, which was indorſed by the proſecutor, and next by the priſoner; who was afterwards apprehended at Exeter with part of the bills and the money. Gould J., before whom he was tried and convicted, reſpited judgment to take the opinion of the Judges whether this were felony or a breach of truſt. In Eaſter term 1766 all the Judges (except Lord Camden, who was abſent,) held it larceny, upon the principle that the poſſeſſion ſtill continued in the maſter.

time, but not reſiding in the houſe, embezzles a bill of exchange, which he received from his maſter in the uſual courſe of buſineſs with directions to tranſmit it by the poſt to a correſpondent; held larceny.

Baſs's caſe, O B. 1782, cor. Adair Serjt Recorder, MS. Buller J. 2 MS. Sum 231. & MS. Jud. (S. C. 1 Leach, 285.)

Goods delivered to a tradeſman's ſervant to carry to a cuſtomer are ſtill in the poſſeſſion of the owner, and the ſervant is guilty of larceny in breaking the package and converting them.

William Baſs was indicted for ſtealing gauze of above 80 l. value of John Gatſea. The priſoner was porter to the proſecutor, (in his general employ), who delivered to him a parcel containing the goods mentioned in the indictment to carry to a cuſtomer. In his way he was met by two men who prevailed upon him to go into a public houſe to drink with them; where they perſuaded him to diſpoſe of the goods, to which he conſented. One of the men then brought a perſon who bought the goods, and the priſoner received eight guineas of the money. The queſtion referred to the Judges was, Whether this amounted to a felonious taking? It was further mentioned as an additional circumſtance, that the goods were taken out of the package in which they had been delivered to the priſoner, and put into a bag at the public houſe. In Mich. term 1782 all the Judges held this to be felony, *becauſe the poſſeſſion ſtill remained in the maſter.* That was the ground of the determination, not only as it appears from the MS. cited in the margin, but alſo as the caſe was afterwards cited by Mr. Juſtice Gould in giving judgment at the O. B. in Wilkins' caſe.

2 Leach, 586. S. C. poſt. f. 104.

Lavender's caſe, Huntingdon Lent Aſſ. 1793.

John Lavender was indicted for larceny at common law of a certain ſum of money belonging to John Edmonds. The priſoner

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priſoner was a ſervant to Edmonds, who had delivered him the money in queſtion to carry to the houſe of one Thomas Flawn, and there to leave the ſame with him, he having agreed to give Edmonds bills for the money in a few days. The priſoner did not carry the money to Flawn as directed, but went away with it, purchaſed a watch and other things with part, and part remained in his poſſeſſion when he was apprehended. Being found guilty, ſentence was reſpited for the opinion of the Judges, whether this were a felony or a breach of truſt: and in Eaſter term 1793 all the Judges held this was a felony, and that the laſt point in Watſon's caſe above referred to was not law. In Trinity term following this caſe was again under the conſideration of the Judges; when they adhered to their former opinion: and ſome ſaid that the diſtinction between this caſe and Watſon's, if there were any, was, that in Watſon's caſe the money was not delivered to the priſoner to be paid ſpecifically to any other perſon; but if the priſoner had laid out his own money to the ſame amount in buying licences, it would have been a compliance with the order. He was commiſſioned to merchandize with the money. But they admitted that the diſtinction, if any, was extremely nice; and Buller J. thought there was none: and recognized the caſe of R. v. Paradice before Gould J. as good law.

cor Perryn B. MS. Buller J. & MS. Jud. *A ſervant going off with money which his maſter had given him to carry to another, and applying it to his own uſe, is guilty of larceny.*

Ante, 562.

Vide that caſe mentioned in R. v. Wilkins, 2 Leach, 591.

Upon an indictment for larceny of a bill of exchange for 122l. the property of R. Burkit and T. Fothergill, it appeared that the priſoner was clerk to the proſecutors, and had the ſole management of their caſh concerns. He received the bills and money remitted and due to his maſters, carried bills to their bankers to diſcount whenever he wanted caſh, made payments for freight and other ſimilar matters, and ſettled the balance with his maſters every week. On the 14th Sept. 1795 the bill in queſtion, due the 17th, was remitted to the proſecutors by the poſt: and Mr. Burkit gave it to another clerk to get it accepted, which he did, and then laid it among other bills on his maſter's deſk. On the 16th September the priſoner carried this and another bill to the bankers, and it being obſerved there that neither of them were indorſed by the proſecutors, it was aſked, Whether they were to be entered ſhort, or diſcounted? The priſoner ſaid

R. v. Chipchaſe, O. B. Oct. 1795, cor. Heath J. 2 Leach, 805. *A clerk who had the general management of his maſter's caſh concerns, and the authority to get his bills diſcounted as occaſion required, diſcounted a bill which had been before received into his maſter's poſſeſſion, for the purpoſe, as appeared, of abſconding with the money, which he accordingly did: held larceny.*

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he wanted ſmall notes and money for them, and that the money muſt be full weight and good, as it was for Mr. Burkit's particular uſe. On the ſame day he abſconded with the money he had thus received, and was taken under a feigned name from on board a ſhip at Falmouth. It was contended that this was only a breach of truſt, the bill having come legally into his poſſeſſion; not delivered for any ſpecific purpoſe, but generally like all the other bills of his maſters over which he had a diſpoſing power: that he had a right to receive the money for the bill, though not to convert it when received to his own uſe; and therefore could not be guilty of ſtealing the bill itſelf: and it was likened to Waite's caſe after mentioned. But Heath J. was clearly of opinion that this was felony; and the priſoner was convicted and ſentenced to tranſportation.

Poſt. p. 570.

§ 16. *What poſſeſſion in the maſter neceſſary to conſtitute larceny in the ſervant taking his goods.*

All that has been ſaid above relating to ſervants is upon a ſuppoſition that the goods purloined were received into the maſter's poſſeſſion before the actual taking by the ſervant: for if the maſter had no otherwiſe the poſſeſſion of them than by the bare receipt of his ſervant upon the delivery of another for the maſter's uſe, and the ſervant have done no act to determine his original, lawful, and excluſive poſſeſſion, as by depoſiting the goods in his maſter's houſe or the like; although to many purpoſes and as againſt third perſons this is in law a receipt of the goods by the maſter, yet it has been ruled otherwiſe in reſpect of the ſervant himſelf upon a charge of larceny at common law in converting ſuch goods to his own uſe: becauſe as to him there was no tortious taking in the firſt inſtance, and conſequently no treſpaſs, as there is where a ſervant converts to his own uſe property in the virtual poſſeſſion of his maſter, whereof he has but the bare charge for ſpecial purpoſes committed to him by ſuch maſter. I ſhall ſubjoin ſome determinations to this purpoſe previous to the act of the 39 G. 3. c. 85. in ſome of which it has been conſidered what was evidence of a previous receipt of the goods into the maſter's poſſeſſion before the converſion of them by the ſervant.

Poſt. p. 571.

Spears' caſe, Kingſton Sp. Aſſ. 1798, cor.

John Spears was convicted on an indictment for ſtealing 40 buſhels of oats of James Browne and Co. in a barge on the

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the Thames. Browne and Co. ſent the priſoner with their barge to Wilſon a corn meter for as much oats as the barge would carry, and which were to be brought in looſe bulk. The priſoner received from Wilſon 220 quarters in looſe bulk, and 5 quarters in ſacks; the priſoner ordering that quantity to be put into ſacks. The quantity in ſacks was afterwards embezzled by the priſoner. And the queſtion reſerved for the opinion of the Judges was, Whether this were felony? the oats never having been in the poſſeſſion of the proſecutors; or, Whether it be not like the caſe of a ſervant receiving charge of, or buying a thing for his maſter, but never delivering it? But they held that this was larceny in the ſervant; for it was a taking from the actual poſſeſſion of the owner as much as if the oats had been in his granary.

Buller J. MS. Jud. (S. C. 2 Leach, 962). *A ſervant goes by command of his maſter with his barge to receive oats in bulk; and afterwards orders part to be put in ſacks, which he embezzles out of the barge: held larceny, the ſame as if taken out of the maſter's granary.*

Another caſe of a ſimilar kind was reſerved from the ſame aſſizes, which being ſtated generally by Buller J. to be of the ſame deſcription as the former, received the ſame determination. That was an indictment framed on the ſtat. 24 G. 2. c. 45. for ſtealing five quarters of oats from a veſſel on the navigable river Thames, the property of J. B. &c. The proſecutors were cornfactors, and the priſoner was their ſervant, and had been employed by them many years, in ſuperintending the unloading of corn veſſels. The proſecutors having purchaſed 240 quarters of oats, on board a Dutch veſſel lying on the Surry ſide of the Thames, of which the five quarters in queſtion were part; while the corn meters were in the act of unloading the oats from the Dutch veſſel into the proſecutor's barge, the priſoner with another perſon came alongſide in a boat, and handed ten empty ſacks on board the Dutch veſſel, deſiring that the ſacks might be filled with oats and tied, ſaying, they were going to be put into an up-country lug-boat. He alſo deſired that the account of the oats put into the ſacks might be carried to the ſcore, and not a ſeparate account made of them. The reſt of the oats were loaded in looſe bulk into the proſecutor's barge. After the ſacks were filled, the priſoner ſent them away to another place, where he ſold them. The priſoner had never been employed by the proſecutors to ſell corn for them, nor was he authorized ſo to do. The priſoner at the enſuing Summer aſſizes received judgment of death; the Judges being of opinion that the conviction was right.

Abrahat's caſe, Surry Sp. Aſſ. 1798, 2 Leach, 960. *A. having purchaſed corn on board a veſſel in the Thames, ſent his barge to receive it in bulk. His ſervant, employed by him to ſuperintend the delivery, ſeparates part from the reſt while on board the veſſel, and embezzles that part by conveying it away immediately by another boat; held larceny on the ſtat. 24 G. 2. c. 45. for ſtealing from a veſſel on the Thames.*

In

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In that caſe there appears to have been a tort committed by the ſervant in the very act of taking; and the property of his maſters in the corn was complete before the delivery to him; and after the purchaſe of it in the veſſel they had a lawful and excluſive poſſeſſion of it as againſt all the world but the owner of ſuch veſſel.

§ 17. *Where no other poſſeſſion than by ſervant.*

It is different where the maſter has no otherwiſe any property or poſſeſſion in the thing ſtolen than by the delivery to the ſervant for the maſter's uſe.

Waite's caſe, Hil. 16 G. 2. B. R. MS. Shapleigh, 2 Leach, 33. S.C. *Before the ſtat.* 15 G. 2. c. 13. ſ. 12. *made it a capital felony for any officer of the Bank to embezzle any bond, &c. depoſited with the Company, or with him as their officer, it was not felony in ſuch officer to whom any bond was delivered for that purpoſe to convert it to his own uſe before he had ſo depoſited it in the proper place; for till ſuch depoſit made the Bank have no poſſeſſion of the inſtrument diſtinct from that of their officer.* *Vide* 12 Ann. ſt. 1. c. 7. & 2 Geo. 2. c. 25. ſ. 3. on which the indictment was framed.

John Waite was indicted for feloniouſly ſtealing ſix Eaſt-India bonds, laid in one count to be the property of the Bank of England, and in another to be the property of a perſon unknown, and laid to be againſt the form of the ſtatute. It appeared that the bonds in queſtion among ſeveral others were paid into the Bank by the order of the court of Chancery in ſeveral cauſes, according to the directions of the ſtat. 12 Geo. 1. c. 32. which makes the Bank accountable for what is ſo paid in; and that Waite was one of the caſhiers, and was employed in tranſacting this buſineſs, and had given ſecurity to the Bank for his integrity; and that he had given receipts for theſe bonds for the governor and company of the Bank of England. That it was the practice of the Bank, when any ſecurities from the court of Chancery were depoſited there, for the directors to lock them up in a cheſt in the cellar; but that the bonds in queſtion were never locked up in the cheſt: but Waite, when he received them from the court of Chancery, put them into his own deſk, and afterwards ſold them, and put the money into his own pocket.

For the priſoner, it was argued, that this was only a breach of truſt, and was not felony. For the ſtat. 21 H. 8. c. 7. which makes it felony in ſervants to take or embezzle their maſters' money, does not extend to it. That the ſtat. 15 Geo. 2. c. 13. had now made this felony; but that act having been made ſince the tranſaction in queſtion happened, ſhewed that it was not felony before. The Judges Carter and Denniſon (*a*) were clearly of opinion that this caſe was not felony; for

(*a*) Mr. Leach's report of this caſe ſays it was tried before Reynolds B.

the

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the bonds were received by Waite, and were never put into the cellar as is usual: so that the possession was always in him, and the Bank had no possession but what was the possession of Waite, till they were brought down and placed in the chest in the cellar as usual. Denniſon J. said, that though this might be such a possession in the Bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution. The prisoner was acquitted.

Bazeley's case, O. B. Feb. 1799. MS. Jud. (S. C. 2 Leach, 973.)

Where a clerk in a banker's shop received money and notes paid in by a customer on his account, and the clerk placed the money in the till, but embezzled the notes immediately; held no larceny, but only breach of trust at common law; for though the possession of the servant is for many purposes and as against third persons the possession of the master, yet here the master never had a possession distinct from the servant as against him; and his receipt being lawful, there was no tortious taking by him, without which there can be no larceny. Alter if he had taken the notes after he had deposited them in the till.

Joseph Bazeley was tried at the O. B. in February 1799, on an indictment for stealing a bank note of the value of 100l. the property of Peter Esdaile and others bankers in London. It appeared in evidence, that Mr. Gilbert, who kept cash with these gentlemen, sent by his servant 122l. in bank notes and 15l. in money, and amongst the bank notes was the note in question. That the servant delivered the whole into the hands of the prisoner, who was a clerk to the bankers, *and as such authorized to receive and give a discharge for the same;* and that it was his duty to put the money received into a till, and to place in another drawer the several bank notes which he might receive during the day, for the purpose of another clerk taking down and entering in a book the particular description of each note. The prisoner gave an acknowledgment to the servant of having received the full sum of 137l., and put the money into the till; but instead of placing the remaining sum of 122l. which he received in bank notes into the drawer according to his duty, he kept back the one of 100l., for which he was indicted; and only delivered over those to the amount of 22l. The jury found the prisoner guilty, subject to the opinion of the Judges, Whether such taking were to be considered as felonious, or only a breach of trust? The case was argued in the Exchequer-chamber in Easter term 39 Geo. 3. before all the Judges, except Ashhurst, Buller, and Heath, Js. who were absent. The arguments are in print, and therefore I shall not detail them at length in this place. It is sufficient to observe, that on the part of the prisoner it was contended to be a breach of trust, and not felony. And these distinctions were taken; that larceny is the taking of property from the possession of another without his consent and against his will: breach of trust the misapplication of property which another by his own voluntary consent has put

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put into the poſſeſſion of the party: and that fraud was (in this reſpect) the obtaining the poſſeſſion of the property of another with his conſent by ſome contrivance againſt which common prudence cannot guard. That in order to conſtitute larceny the owner of the property muſt be in poſſeſſion of it either actually or conſtructively. That here there was no actual poſſeſſion, nor any conſtructive poſſeſſion as againſt the priſoner. In the courſe of the argument it was ſtated and admitted that the priſoner had given his employers ſecurity to account for what he received, and againſt embezzlements. And on the part of the priſoner this was likened to a caſe of one Bull (*a*) who was indicted for receiving his maſter's money. The proſecutor was a paſtry-cook, and having occaſion to ſuſpect he was robbed by the priſoner, who was his ſervant attending his ſhop, he employed a cuſtomer to come to his ſhop, on pretence of buying ſomething; and for this purpoſe he gave him ſome marked ſhillings of his own, with which the cuſtomer came to the ſhop in the abſence of the owner, and bought goods of the defendant. Soon after the maſter coming in examined the till where the defendant ought to have depoſited the money when received, and not finding all the marked money there, he procured the defendant to be immediately apprehended and ſearched, and the reſt of the marked money was found upon him. After conviction the point was ſaved by Mr. Juſtice Heath; and the Judges on being conſulted were of opinion that the priſoner was not guilty of larceny, but only of a breach of truſt; the money never having been put in the till, and therefore not having been in poſſeſſion of the maſter as againſt the defendant. And Waite's caſe before mentioned was very mainly relied on, in order to ſhew that this was a mere breach of truſt; confirmed as the doctrine there laid down had been by the acts of the legiſlature in providing in future againſt embezzlements of that ſort in the particular caſe of the Bank, by the act of the 15 Geo. 2. c. 13. and by ſimilar ſtatutes

(*a*) Thomas Bull's caſe, O. B. Jan. Seſſ. 1797, cor. Heath J. and afterwards before the Judges in Hilary term following. No regular caſe in writing was laid before the Judges; but the circumſtances were as ſtated here; and the priſoner, who appears by the O. B. Seſſions' Papers to have received ſentence of tranſportation, was afterwards recommended for a pardon. *Vide* 2 Leach, 980. S. C.

in

in regard to the Poſt-office and other caſes. And the particular contract between the priſoner and his employers was alſo inſiſted upon, as diſtinguiſhing this from the general caſe of maſter and ſervant. Ch. XVI. § 17. *By ſervants.*

During the argument Eyre C. J. obſerved, that Charlewood's caſe and other caſes of the ſort turned upon the poſſeſſion having been unlawfully obtained by the priſoner; but that here there was no evidence to find ſuch an original intention to ſteal, becauſe the poſſeſſion came to the ſervant in the ordinary courſe of his buſineſs, without any act of his own for that purpoſe.

For the crown, it was inſiſted upon as a general rule, that in the caſe of perſonal chattels the poſſeſſion in law follows the right of property. That if by law the poſſeſſion of the ſervant were that of the maſter, which could not be denied, then no compact between them to indemnify the maſter could do away the operation of the law. That the cuſtomer did not mean to depoſit the notes as a matter of truſt in the clerk's hands; for they were paid in the banker's own houſe, of which the defendant was only one of the organs; and therefore it was like paying money into the hands of the bankers themſelves; and the act of receipt by the clerk eo inſtanter veſted the poſſeſſion in them. That in Bull's caſe the ſervant had authority to ſell the goods, and was only accountable for their value; but the priſoner had no authority to diſpoſe of the notes which he received in the ſhop. But there could be no doubt in that caſe, if the ſervant had embezzled the maſter's goods out of his ſhop it would have been felony. That conſidering this as a bailment, yet part of the property being depoſited in its proper place, the ſeparating the other part made it a felony, for the bailment was entire. That in Waite's caſe there was a perſonal confidence repoſed in him by the perſon making the depoſit in the known authenticated character of *caſhier of the Bank*. The act of parliament directing the depoſit to be with the *caſhier of the Bank*; and therefore a delivery to him at any place would have been ſufficient.

Lord Kenyon C. J. thereupon obſerved, that the proviſions of that act would hardly warrant an inference that the depoſit was directed to be made perſonally with the caſhier; but merely with him as an officer of the corporation, who muſt

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act by their agents. And Lord C. J. Eyre remarked, that the money and bonds were to be paid *to the Bank*, though *the caſhier's receipt* was to be a diſcharge ſo as to bind the Bank.

It was then ſaid that the act was made pro majori cautelâ.

Vide ante. *Vide* Chipchaſe's caſe, ante, 567. where the note having been once in the maſter's poſſeſſion, and afterwards taken by the clerk, was ruled to be felony by Heath J. O. B. Oct. 1795.

Afterwards on conſultation among the Judges, ſome doubt was at firſt entertained; but at laſt all aſſembled agreed that it was not felony, inaſmuch as the note was never in the poſſeſſion of the bankers diſtinct from the poſſeſſion of the defendant; though it would have been otherwiſe if the priſoner had depoſited it in the drawer, and had afterwards taken it. And they thought that this was not to be differed from the caſes of Waite and Bull, which turned on this conſideration, that the thing was not taken by the priſoner out of the poſſeſſion of the owner: and here it was delivered into the poſſeſſion of the priſoner. That though to many purpoſes the note was in the actual poſſeſſion of the maſters, yet it was alſo in the actual poſſeſſion of the ſervant, and that poſſeſſion not to be impeached, for it was a lawful one. Eyre C. J. alſo obſerved, that the caſes ran into one another very much, and were hardly to be diſtinguiſhed. That in the caſe of the King v. Spears the corn was in the poſſeſſion of the maſter under the care of the ſervant. And Lord Kenyon ſaid he relied much on the act of parliament reſpecting the Bank not going further than to protect the Bank. The priſoner was accordingly recommended for a pardon.

§ 18. Stat. 39 Geo. 3. c. 85. againſt embezzlements by ſervants, &c.

This deciſion, however juſt in leaning to the merciful ſide on a doubtful queſtion of law, having opened a door to the moſt alarming and extenſive frauds by ſervants in general, and particularly in thoſe inſtances where from the very nature of their employment they were unavoidably entruſted with the receipt of large ſums of money in commercial tranſactions, the legiſlature thought it neceſſary to interfere immediately, and accordingly the declaratory act of the 39 Geo. 3. c. 85. was paſſed, intitled "An act to protect maſters "againſt embezzlements by their clerks or ſervants;" which reciting that "whereas bankers, merchants, and others, "are, in the courſe of their dealings and tranſactions, fre- "quently obliged to entruſt their ſervants, clerks, and per- "ſons employed by them in the like capacity, with receiv- "ing, paying, negociating, exchanging, or transferring,

Preamble.

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" money, goods, bonds, bills, notes, bankers drafts, and other " valuable effects, and ſecurities: and whereas doubts have " been entertained whether the embezzling of the ſame by " ſuch ſervants, clerks, and others, ſo employed by their " maſters, amounts to felony by the law of England; " and it is expedient that ſuch offences ſhould be pu- " niſhed in the ſame manner in both parts of the United " Kingdom;" enacts and *declares*, that if any ſervant " or clerk, or any perſon employed for the purpoſe in " the capacity of a ſervant or clerk, to any perſon or per- " ſons whomſoever, or to any body corporate or politick, " ſhall, by virtue of ſuch employment, receive or take into " his poſſeſſion any money, goods, bond, bill, note, banker's " draft, or other valuable ſecurity, or effects, for or in the " name or on the account of his maſter or maſters, or em- " ployer or employers, and ſhall fraudulently embezzle, ſe- " crete, or make away with the ſame, or any part thereof; " every ſuch offender ſhall be deemed to have feloniouſly " ſtolen the ſame from his maſter or maſters, employer or " employers, for whoſe uſe or in whoſe name or names, or on " whoſe account the ſame was or were delivered to or taken " into the poſſeſſion of ſuch ſervant, clerk, or other perſon " ſo employed; although ſuch money, goods, bond, bill, " note, banker's draft, or other valuable ſecurity, was or " were no otherwiſe received into the poſſeſſion (*a*) of his or " their ſervant, clerk, or other perſon ſo employed. And " every ſuch offender, his adviſer, procurer, aider, or abet- " tor, being thereof lawfully convicted or attainted, ſhall be " liable to be tranſported to ſuch parts beyond the ſeas as " his majeſty, by and with the advice of his privy council, " ſhall appoint, for any term not exceeding fourteen years, " in the diſcretion of the court before whom ſuch offender " ſhall be convicted or adjudged."

Servants or clerks taking into their poſſeſſion any money or other effects on their maſter's account, and fraudulently embezzling or ſecreting any part thereof, ſhall be deemed to have feloniouſly ſtolen the ſame; and ſuch offenders and their abettors ſhall, on conviction, be liable to be tranſported for 14 years.

(*a*) By ſome blunder, in the fair copy taken from the original draft of the act, a line has been here omitted which was in the original draft prepared by myſelf. The words omitted are thoſe which follow in Italics; " although ſuch money, &c. was or were no otherwiſe received into the poſſeſſion *of ſuch* " *maſter or maſters, employer or employers, but by the actual poſſeſſion* of his or their " ſervant," &c. the inſertion of which words will make the language of the legiſlature, as to the particular occaſion of paſſing the act, more intelligible than it is at preſent.

On

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Jones's caſe, Winton Sp. Aſſ. 1800, MS. *Indictment on the ſtatute muſt purſue the words of it.*

On a general indictment for larceny at common law, the facts were, that the priſoner a ſervant had ſtolen ſeveral articles of wearing apparel from his maſter; and it was contended on the part of the proſecution, that under the above act there muſt be judgment of tranſportation; but Palmer Serjt. who tried the priſoner, on the next day ſaid he had communicated with Mr. Juſtice Lawrence (the other Judge on the circuit) on the ſubject; and they were both of opinion that in order to found a judgment upon the ſtatute the indictment muſt be ſpecially drawn, ſo as to bring the caſe within it.

M'Gregor's caſe, O. B. Sept. 1801, cor. the Common Serjeant. MS. Jud. *Indictment on the ſtatute muſt contain the requiſites of an indictment for larceny at common law.*

An indictment on the ſame ſtat. of the 39 Geo. 3. c. 85. charged that John M'Gregor after the 12th July 1799, to wit, on, &c. at, &c. (he the ſaid J. M'G. then and there being a clerk to G., S. &c. and employed by them in the capacity of ſuch clerk,) did by virtue of ſuch his employment receive and take into his poſſeſſion 300 l. for and on account of the ſaid G., S. &c. the ſaid maſters and employers of the ſaid J. M'G.: and that he the ſaid J. M'G. afterwards, to wit, on, &c. at, &c. with force and arms, fraudulently and feloniouſly did embezzle and ſecrete the ſaid 300l., againſt the form of the ſtatute, &c. And ſo the ſaid J. M'G. then and there, to wit, on, &c. at, &c. with force and arms feloniouſly did ſteal, take, and carry away the ſaid 300l. from the ſaid maſters and employers of him the ſaid J. M'G., on whoſe account the ſaid 300l. was ſo taken into the poſſeſſion of him the ſaid J. M'G., being ſuch clerk ſo employed, and by virtue of ſuch his employment as aforeſaid, againſt the form of the ſtatute, &c. After conviction it was moved in arreſt of judgment that the indictment was defective, inaſmuch as the money alleged to have been feloniouſly ſtolen, taken, and carried away by the priſoner was not expreſsly averred to be the money of any perſon. And the caſe was argued before all the Judges (except Lord Kenyon and Heath J. abſent) in Hilary term 1802 in the Exchequer-chamber.

On the part of the priſoner it was contended, that the ſtatute did not mean to make *embezzling*, eo nomine, a ſubſtantive felony; but to declare that under certain circumſtances it ſhould be adjudged larceny: the words being that "he ſhall be deemed to have *feloniouſly ſtolen* the ſame;" which refers to a well-known common law offence; to which

which alſo the doubts ſtated in the preamble could alone refer. That conſequently the indictment muſt have all the requiſites of an indictment for larceny at common law. So in the ſtat. 1 Ed. 6. c. 12. the words "felonious ſtealing "of horſes," are uſed as deſcriptive of larceny of horſes: but it was never conceived that an indictment which merely followed the words of that ſtatute would be a ſufficient deſcription of the offence. So indictments on the ſtatutes 8 Eliz. c. 4. 22 Car. 2. c. 5. 3 & 4 W. & M. c. 9. ſ. 1. 10 & 11 W. & M. c. 23. ſ. 1. 12 Ann. c. 7. and 24 Geo. 2. c. 45. againſt ſtealing particular goods, or under certain circumſtances, all purſue the ſame form as to the requiſite parts of larceny at common law. On the other hand it was contended that the ſtatute in queſtion made the embezzling by ſervants in the manner ſtated a ſubſtantive felony, which before was only a miſdemeanor, or breach of truſt for which the maſter had a civil remedy. That it was therefore ſufficient to follow the words of the act as in other inſtances where new offences were created; which differed from indictments on ſtatutes merely outting the offender from clergy in caſes which were before larcenies at common law. That the Legiſlature in this inſtance meant to take in caſes where the property being as it were in tranſitu it was difficult to aſcertain in whom it was at the time of the offence committed: it therefore meant to relieve the proſecutor from the neceſſity of laying it to be in any particular perſon. That at any rate no technical form of words was neceſſary in charging a thing to be the property of another; and that here enough was ſtated to ſhew that it was not the priſoner's own property, being charged to have been received by him *on account of his maſters;* which was tantamount to an allegation of their having a ſpecial property in it. In reply it was urged, that if it were neceſſary to allege the property in any perſon, it muſt be ſo alleged expreſsly, and could not be collected by intendment. That the uſual form of indictment in theſe caſes was to charge that the priſoner took and carried away the monies, &c. *being the proper monies of the proſecutor.*

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Ch. XVI. § 18. *By servants.*

The Judges at first entertained great doubt upon the case; which stood over for further consideration; and a difference of opinion for some time prevailed: but on the 25th of Feb. 1802 all the Judges (except Lord Kenyon and Rooke J.) met at Mr. Justice Heath's, when they were of opinion that the indictment was bad in not alleging the money to be the money of the prosecutors. That the statute made the offence a larceny; and made the possession of the servant under such circumstances the possession of his masters.

It may be observed, that the statute in question does not upon this construction of it necessarily exclude any other punishment than that of transportation; but inasmuch as it makes the offence larceny, and only provides that the offender shall be liable to be transported for not more than 14 years, it appears to let in any other judgment, at least of an inferior degree, to which larceny of the same description is subjected by any other law.

§ 19. *By servants in public trusts.*

Servants employed in public trusts of high importance have in several instances been subjected even to capital punishment for embezzlement of the things committed to their charge.

By officers and servants of the Bank of England. 15 Geo. 2. c. 13. s. 12.

By the stat. 15 Geo. 2. c. 13. s. 12. (which was before adverted to as furnishing an argument in the cases of Waite (*a*) and Bazeley) it is enacted, that "if any officer "or servant of the Bank, being entrusted with any note, "bill, dividend-warrant, bond, deed, or any security, money, "or other effects belonging to the said company, or having "any bill, dividend-warrant, bond, deed, or any security or "effects of any other person or persons lodged or deposited "with the said company, or with him as an officer or servant "of the said company, shall secrete, embezzle, or run away "with any such note, bill, dividend-warrant, bond, deed, "security, money, or effects, or any part of them; being

(*a*) The act was passed before the determination in Waite's case, though the fact happened before the act was passed. The provision in question is one of many other regulations touching the Bank and its officers, upon occasion of a loan granted by the Company to Government.

"thereof

" thereof convicted, he shall be deemed guilty of felony, and " shall suffer death as a felon without benefit of clergy."

Ch. XVI. § 19. *By officers, &c. of the Bank.*

The stat. 35 Geo. 3. c. 66. s. 6. and 37 Geo. 3. c. 46. for making certain annuities created by the parliament of Ireland transferable, and the dividends payable at the Bank of England, contain exactly the same provisions with respect to officers or servants of the Bank " entrusted with any " note, bill, dividend-warrant, or warrant for payment of " any annuity or interest or money, or any security, money, " or other effects of or belonging to the said governor, &c., " or having any note, &c. or other effects of any other person " or persons, body politic or corporate, lodged or deposited " with the said governor, &c. or with him as an officer or " servant, &c. in pursuance of those acts."

35 Geo. 3. c. 66. & 37 Geo. 3. c. 46. s. 6.

It may perhaps be thought that the general words of the stat. 39 Geo. 3. c. 85. before set forth extend to cover these and other acts of the same kind, so as to do away the capital part of the punishment therein prescribed: but it is observable that the Legislature could not have had such a repeal in contemplation, because they recite that doubts had been entertained whether the offences described in the act of the 39 Geo. 3. amounted to felony by the law of England; which doubts could never have attached on the cases particularly provided for and expressly made felony by the acts now in question; and they then proceed to enact and declare, that those offences shall be deemed felony; a provision altogether nugatory in respect to the officers and servants of the Bank of England and other public companies, whose embezzlements were before specially inhibited and made felony without benefit of clergy.

§ 20. *By officers and servants of the South Sea Company.*

The stat. 24 Geo. 2. c. 11. s. 3. enacts the same provision with regard to the officers and servants of the South-Sea company, in the same terms as are contained in the stat. 15 Geo. 2. c. 13. s. 12.

24 Geo. 2. c. 11. s. 3.

§ 21. *By persons in the Post-office.*

By the stat. 7 Geo. 3. c. 50. s. 1. re-enacting more largely the provisions of the 5 Geo. 3. c. 25. s. 17. it is enacted, that " if any deputy, clerk, agent, letter-carrier, post-boy, " or rider, or any other officer or person whatsoever em-

5 G. 3. c. 25. s. 17. 7 Geo. 3. c. 50. s. 1.

Ch. XVI. § 21. *By persons in the Post-office.*

Vi. post. § 24. 38. *further provisions respecting larceny in general of letters.*

" ployed in receiving, ſtamping, ſorting, charging, carrying, " conveying, or delivering, letters, or packets, or in any " other buſineſs relating to the poſt-office, ſhall ſecrete, em- " bezzle, or deſtroy, any letter, packet, bag, or mail of letters " which they ſhall be entruſted with, or which ſhall have " come to their poſſeſſion, containing any bank note, bank " poſt bill, bill of exchange, exchequer bill, South-Sea or " Eaſt-India bond; dividend-warrant of the Bank, South- " Sea, Eaſt-India, or any other company, ſociety, or corpo- " ration; navy, or victualling, or tranſport bill, ordnance " debenture, ſeamen's ticket, ſtate lottery ticket, or certifi- " cate, Bank receipt for payment on any loan, note of aſ- " ſignment of ſtock in the funds, letter of attorney for re- " ceiving annuities or dividends, or for ſelling ſtock in the " funds, or belonging to any company, ſociety, or corpora- " tion; American provincial bill of credit, goldſmiths' or " bankers' letter of credit, or note, for or relating to the " payment of money, or other bond, or warrant, draught, " bill, or promiſſory note whatſoever for the payment of " money; or ſhall ſteal and take any of the ſame out of any " letter or packet that ſhall come to his poſſeſſion; every " ſuch offender ſhall on conviction be deemed guilty of " felony, and ſuffer death without benefit of clergy."

Clay's caſe, York Lent Aſſ 1784. cor Willes J. MS. Cr. Caſ. Reſ. & MS. Buller J.

Upon a conference of all the Judges in the caſe of Charles Clay, in Eaſter term 1784, they held it not to be neceſſary in order to ground a conviction on the abovementioned ſtatute that the perſon employed by the poſt-office ſhould have taken the oath mentioned in the ſtat. 9 Ann. c. 10. ſ. 41. (*a*).

Shaw's caſe, O.B. May 1771, 2 Blac. Rep. 789. *Qu. Whether one indicted as a charger and ſorter of letters may not be convicted as a ſorter only? but if acquitted on the ſpecial count he cannot be convicted on a general count as a perſon employed in the Poſt-office, on evidence that he was no otherwiſe employed than as a ſorter.*

Shaw being indicted on theſe ſtatutes was charged in the 1ſt and 3d counts as a clerk employed *in charging and ſorting* letters in the poſt-office; and in the 2d and 4th, *as a perſon employed in the buſineſs relating to the General Poſt-office.* It turned out that he was only a *ſorter*, and not a charger of letters; and was therefore acquitted by order of the court

(*a*) It is thereby enacted, that no perſon ſhall be capable of exerciſing any employment relating to the poſt-office, &c. unleſs he ſhall have firſt taken a certain oath: but no penalty is annexed to the omiſſion thereof. The priſoner was acquitted on the firſt indictment on the ſuppoſed validity of the objection that he had not taken ſuch oath; but as other indictments were pending againſt him for the like offences, it was thought neceſſary to take the opinion of the Judges on the point.

or

on the 1ſt and 3d counts, and found guilty on the other two. Whereupon it was objected, that having been acquitted on the counts charging him as a ſorter and charger, and as he did not appear to have been employed by the poſt-office in any other buſineſs than that of ſorting, which is one of the employments particularly ſpecified in the ſt. 7 G. 3. he ought not to have been convicted on the other two counts. And of this opinion were all the Judges preſent, upon argument before them at Serjeants'-Inn: but they inclined to think that the jury might have convicted the priſoner on the 1ſt and 3d counts, by a ſpecial finding that he was a ſorter only.

Ch. XVI. § 21. *By perſons in the Poſt-office.*

Benjamin Willoughby was indicted on the ſtat. 7 G. 3. c. 50. for that he, being a clerk employed in the poſt-office at Birmingham in ſtamping and charging letters, &c. ſtole and took out of a letter which was put into the office there *a certain warrant for the payment of money* of the following tenor:

§ 22. *As to the contents of the letter.* Willoughby's caſe, Warwick Lent Aſſ. 1783, MS. Gould J. *A bill of exchange may be laid as a warrant for the payment of money within the ſtat.*

Poſt Bill.

N° 6127. Birmingham, 13th Feby 1783.

Sir Wm Lemon B^{t} and C^{o} Bankers, London.

Pay 5 G^{s} to Mr Richd Moore or bearer on Dem^{d} value rec^{d} Robt Coales.

Five G^{s}
ent^{d} R. Moore.

The fact of ſtealing being proved, it was objected, that according to the true conſtruction of the ſtatute this was *not a warrant for the payment of money*, but a *poſt* bill (*a*), note, *or bill of exchange.* And the priſoner being found guilty, judgment was reſpited to take the opinion of the Judges. At a conference of the Judges in Eaſter term 1783, Aſhhurſt J., Perryn B., and Buller J. doubted at firſt whether this were a warrant within the meaning of the act. For the act having enumerated ſpecific things, and bills of exchange being expreſsly mentioned, the words "other warrant" muſt mean ſomething beſides a bill of exchange, viz. warrants from ſome of the public boards for payment of money, which are ſpecific things differing from bills of exchange; and therefore as this was a bill of exchange, the deſcription in the indictment was improper. But finally they admitted, that the caſe

(*a*) It was obſerved, that the words of the act are, "*Bank* poſt bill." MS. Gould J. MS. Buller J.

Ch. XVI. § 22. *By persons in the Post-office.*

could not be distinguished from R. v. Shepherd, Mich. 1781, where, in forgery, the indictment was laid in the same manner, and holden good. And the other nine Judges were all clear (and the three finally appeared to be satisfied) that the indictment was well laid; for though it was a bill of exchange, it was also a warrant for payment of money; it was a voucher to the bankers or drawees, if genuine, for the payment: and it might also have been laid to be a draught. Gould J. compared this to Mitchell's case, Fost. 119. where a warrant or order for payment of money or delivery of goods was holden to mean where a man has money or goods in the hands of another, not where he directs them to be supplied on credit: and considering this, whether as a bill of exchange or warrant, it purported that Coales had money in the drawer's hands. Eyre B. said it would be the same if a dividend-warrant of the Bank were made in the form of a bill of exchange. And they were of opinion that the indictment might be laid either way.

Vide tit. Forgery.

MS. Crown Cas. Res.

Skutt's case, O. B. 1774, cor. Willes J. & Glynn Recorder, 1 Leach, 124. *Stealing letters containing money not within the statute.*

Timothy Skutt, who was a sorter of letters in the post-office, stole two letters, each containing 5s. 3d. in gold coin; and being indicted on these statutes, and the fact proved; it was objected, that as the letters contained money, and not any security relating to the payment of money mentioned in the acts, the case did not fall within them: and the court being of the same opinion, he was acquitted on that indictment; but was again indicted and convicted of grand larceny for stealing the money, and was transported.

Isaac Moore's case, O. B. Sep. 1792, cor. Hotham B. MS. Buller J. (S. C. 2 Leach, 655.) *Indictment for secreting two letters containing therein a Bank note, and proof that it was sent in halves on different days, held within the act. Aliter perhaps of a taking.*

In Moore's case it was holden upon a conference by all the Judges (except Buller J. who was absent, and doubted) that a letter-carrier secreting half a bank note in one letter on one day, and the other half in another on another day, is a secreting within the stat. 7 Geo. 3. c. 50. The doubt was, whether *secreting* in the statute did not mean the original secreting, as taking does. But they distinguished between taking and secreting; for after the prisoner had got possession of the second letter, he secreted both. In that case, one count of the indictment charged the prisoner with secreting *two certain letters* before sent by the post, then containing therein a certain bank note; to which alone the evidence applied.

The

The note or other ſecurity ſtolen in the letter may be deſcribed generally in the indictment, as appears by the caſe of Milnes aftermentioned.

Ch. XVI. § 22. *By perſons in the Poſt-office.*

Poſt. ſ. 37.

§ 23.

As to the intent. Joſeph Sloper's caſe, O. B. Jan. 1772, cor. Blackſtone J. 1 Leach, 94.

Secreting a letter containing a Bank note, not knowing the contents, but with intent only to embezzle the poſtage paid.

In Sloper's caſe, who was indicted on the ſame ſtatutes of G. 3. the jury found ſpecially that the priſoner was a perſon employed by the poſt-office in ſtamping and facing letters: and that on the 26th October 1771 he ſecreted a letter which came into his hands by virtue of his office, containing a 10l. bank note; but that he did not open the ſame, nor know that the bank note was contained therein; but that he ſecreted it with intent to defraud the king of the poſtage thereof, which had been paid. The priſoner remained, it is ſaid, in Newgate ſeveral years for judgment, but it does not appear what judgment was given.

This caſe ſeems to fall within one of the offences provided for by the 19th clauſe of the ſtat. 5 Geo. 3. c. 25. after mentioned: but ſome difficulty might have ariſen in bringing it within the correſponding clauſe of the 7 Geo. 3. c. 50. ſ. 3. becauſe it appeared that the letter had not been deſtroyed, but was found in the priſoner's cuſtody.

Vide Howatt's caſe, poſt. ſ. 39.

§ 24.

5 Geo. 3. c. 25. ſ. 19.

Embezzling the poſtage received, or deſtroying letters, or advancing rate of poſtage, and not accounting for the ſame, felony.

Vide Howatt's caſe, poſt. ſ. 39.

It is further enacted by the ſtat. 5 Geo. 3. c. 25. ſ. 19. that "if any deputy, clerk, agent, letter-carrier, or other "ſervant appointed, authorized, and entruſted to take in "letters or packets, and receive the poſtage thereof, ſhall "embezzle or apply to their own uſe any money or monies "by him or them received with ſuch letters or packets for "the poſtage thereof; or ſhall burn or otherwiſe deſtroy "any letter or letters, packet or packets by him, &c. ſo taken "in or received; or who by virtue of their reſpective offices "ſhall advance the rates upon letters or packets ſent by the "poſt, and ſhall not duly account for the money by him, &c. "received for ſuch advanced poſtage; every ſuch offender, "being thereof convicted, ſhall be deemed guilty of "felony."

The wording however of the correſponding clauſe (ſ. 3.) in the ſtat. 7 Geo. 3. c. 50. varies very materially from the foregoing, though it does not profeſs in terms to repeal it. It is however intitled "An act to amend certain laws re-

Ch. XVI. § 24. *By persons in the Post-office.*

"lating to the revenue of the post-office," &c. and enacts, that "if any deputy, clerk, agent, letter-carrier, officer, or "other person whatsoever, employed in any business relating "to the post-office, shall take and receive into his, her, or "their hands or possession any letter or letters, packet or "packets, to be forwarded by the post, and receive any sum "or sums of money therewith for the postage thereof, shall "after the first November 1767 burn or otherwise destroy "any letter or letters, packet or packets, by him, her, or them "so taken in, or received; or if any such deputy, clerk, "agent, letter-carrier, officer, or other person whatsoever, "so employed, shall advance the rate or rates of postage "upon any letter or letters, packet or packets, sent by the "post, and shall secrete and not duly account for the money "by him, her, or them received for such advanced postage; "every such offender or offenders, being thereof convicted "as aforesaid, shall be deemed guilty of felony."

With respect to other felonies touching the post-office which relate more to the things stolen than to the persons by whom such offences are committed, they will be more properly treated of under the next head of inquiry, of what things larceny may be committed.

Post. f. 38.

§ 25. *By manufacturers.* 17 Geo. 3. c. 56.

By the stat. 17 Geo. 3. c. 56. f. 1. persons employed in the felt or hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures, or in manufactures of the said materials mixed one with another, who shall purloin, embezzle, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any of the materials with which they are entrusted, whether wrought up or not, are punishable in a summary manner before two justices; who are directed, for the first offence to commit the offender to the house of correction or other public prison, there to be kept to hard labour not less than 14 days nor more than three months, and for any subsequent offence not less than three nor more than six months; and in either case may also in discretion order the party to be once publicly whipped. And by f. 3. if any person shall buy, receive, accept, or take by way of gift, pawn, pledge, sale, or exchange, or in any other manner whatsoever from any such person before described, such materials,

terials, &c. they shall on like summary conviction for the first offence forfeit not less than 20l. nor more than 40l. to be applied as therein directed, or on failure of payment shall be committed in like manner for not more than six nor less than three months, or committed for three entire days and once publicly whipped; for a second offence to be committed to the quarter sessions, and on conviction shall forfeit not more than 100l. nor less than 50l., or on failure of payment shall be committed to house of correction, &c. there to be kept to hard labour not more than six nor less than three months, or for three entire days and to be once publickly whipped. By s. 5. selling, pawning, pledging, exchanging, or otherwise unlawfully disposing of any of the said materials, knowing them to have been embezzled, &c. subjects the offender to the same punishment as the principal. Ch. XVI. § 25. *By manufacturers.*

I have referred to the above statute as the most general in its operation for withdrawing petty offenders of this description from the cognizance of the ordinary tribunals, and subjecting them to a summary jurisdiction: but there are various other statutes of the same kind which are to be met with in Mr. Burn's Justice of the Peace, touching larcenies by particular descriptions of the same persons,

§ 26.

It was doubted in Mary Raven's case whether a lodger fraudulently purloining any of the furniture in his lodging were guilty of larceny, he having, as was thought, a kind of special property in the goods. And in Rex v. Meeres and others, T. 1 W. & M. a majority of the Judges determined in the negative. And yet if it clearly appear that he took the lodgings with intent to gain a better opportunity of rifling them, and to elude the law, there seems no reason why it should not be felony at common law. And in the last-mentioned case, Rokesby and Ventris Js. concurred with the majority, because no such intent appeared; and all thought the principal point deserving of very good consideration. But the stat. 3 & 4 W. & M. c. 9. appears to have gone still further, by enacting and *declaring*, "that if any person or "persons shall take away, with intent to steal, embezzle, or "purloin, any chattel, bedding, or furniture, which by con- "tract or agreement he or they are to use, or shall be let to "him

By lodgers.
2 MS. Sum 236.
1 Hawk. ch. 33. s. 10.
Mary Raven's case, O. B. 14 Car. 2.
Kel. 24. 81, 2.
Meere's case, 1 Snow. 50.

3 & 4 W. & M. c. 9. s. 5.

Ch. XVI. § 26. *By lodgers.*

" him or them to uſe in or with ſuch lodging; ſuch taking, " embezzling, or purloining ſhall be to all intents and pur- " poſes taken, reputed, and adjudged to be larceny and fe- " lony; and the offender ſhall ſuffer as in caſe of felony."

But notwithſtanding this is a declaratory as well as enacting law in the terms of it, yet the declaratory part of it muſt be conſtrued with reference to the preamble, and by which alone it ſeems to be warranted (*a*); and that recites that it was a frequent practice " to hire lodgings *with an intent to have* " *an opportunity to take away, embezzle, or purloin the goods and* " *furniture being in ſuch lodgings.*"

Palmer's caſe, Suſſex Lent Aſſ. 1795, MS. Jud. & MS. Buller J. (S. C. 2 Leach, 782.) *Where the whole houſe ready furniſhed was let to the priſoner, he cannot be indicted on the ſtat. 3 & 4 W. & M. c. 9. for ſtealing the goods in the lodging-houſe: particularly where by the agreement he was to make good every thing which was miſſing or injured.*

As to what ſhall be conſidered as a lodging within the act; Charles Palmer was indicted for ſtealing ſome ſilver ſpoons of J. G. " in a *lodging-houſe* of the ſaid J. G. let by him to the priſoner, and to be uſed by the priſoner with the ſaid *lodging-houſe.*" Another count deſcribed the place as *lodgings*, inſtead of a *lodging-houſe*, to which the evidence did not apply; the fact appearing to be, that the priſoner had hired the whole houſe ready furniſhed by the week: and it was particularly agreed that he ſhould make good every thing which was miſſing or injured (*b*). The ſpoons ſtolen by him were let with the houſe. After conviction, ſentence was reſpited upon a doubt whether the caſe were within the ſtatute, which uſes the word *lodging* and not *lodging-houſe*; and the caſe, by deſire of the priſoner, was argued before all the Judges (except Aſhhurſt J.) in the Exchequer-chamber on the 16th of June 1795. On the 25th of the ſame month all the Judges (in the abſence of Groſe J.) agreed that this was not a caſe within the act of parliament. Eyre C. J. ſaid, it was meant to apply to caſes where the owner had a poſſeſſion, and the lodger the uſe, and was made to obviate a doubt as to the owner's poſſeſſion: and Buller J. referred to the ſtat. 30 Geo. 2. c. 3. as explanatory of the word Lodger, which gives a penalty againſt *houſeholders* for not giving an account of their *lodgers* to the aſſeſſors of the land-tax. It was alſo thought by ſome that the agreement to make good what ſhould be miſſing took this caſe out of the ſtatute.

(*a*) Except perhaps where the owner continuing in the houſe may be ſaid to retain the *poſſeſſion* of the furniture, and the lodger to have only the *uſe*

(*b*) There was alſo another count for a common larceny.

Am

Ch. XVI. § 26. *By lodgers.*

An indictment on this statute charged the prisoner with stealing of T. N. certain articles of furniture specified, "the same goods and chattels being in a certain lodging-room in the dwelling-house of the said T. N. there situate, let by contract by the said T. N. to the said defendant, and to be used by the said defendant with the lodging aforesaid," &c. After conviction, it was objected in arrest of judgment, that the indictment was defective in not having stated that the goods were let *at the time* they were stolen. But in Michaelmas term 1793 all the Judges held the indictment sufficient. Mr. Justice Ashhurst, in delivering the opinion of the Judges at the O. B. in the December following said, that if the words "in the dwelling-house of the said T. N." were put in a parenthesis, it would make the sense clear, and the averment would be sufficient; for then it would run thus, "the same goods and chattels being in a certain lodging-room (in the dwelling, &c.) let by contract, &c. and to be used by the said defendant with the lodging aforesaid." And he observed that indictments on this statute had always been drawn in the present form.

Burnell's case, O. B. June 1793, MS. Buller J. (S. C. 2 Leach, 668.)
Form of indictment in describing the goods let with the lodging at the time.

Sess. Pap. p. 168.

The indictment on the statute must also set forth as well the name of the person by whom, as of the person to whom the lodgings were let.

Ann Pope's case, O. B. July 1784, cor. Adair Serjt. Rec. 1 Leach, 377. Sess. Pap. No. 747.

4. *Of what Things Larceny may be committed.*

§ 27.
Of goods personal, not of realty.
1 Hawk. ch. 33. s. 21.
2 MS. Sum. 247.
1 Hale, 509, 510.
4 Blac. Com. 233.
Sum. 66.
Staundf. 25. b.

It must be of goods personal, and not of chattels real, or such as are annexed to the freehold, unless in certain cases provided for by statute. For at common law it is merely a trespass, and not a felony to take such things: the reason of which seems to be, that things annexed to the freehold, being usually more difficult to remove, are less liable to be stolen, and therefore need not be secured by such severe laws as mere personal goods require. Wherefore no larceny can be committed of trees, grass, hedges, stones, or lead of a house, or the like. But when once they are severed from the freehold, either by the owner, or even by the thief himself, if there be an interval between his severing and taking them away, so that it cannot be considered as one continued act, it would then be felony to take them away. Thus of wood cut,

Ch. XVI. § 27. *Of goods perſonal, not of realty.*

cut, graſs in cocks, ſtones dug out of a quarry, larceny may be committed. But ſeveral exceptions to the general rule have been made by ſtatute.

§ 28. *Garden roots, ſhrubs, &c.* 6 Geo. 3. c. 36.

By ſtat. 6 Geo. 3. c. 36. ſ. 1. "Every perſon who ſhall, "*in the night-time*, pluck up, dig up, break, ſpoil, or deſtroy, "or carry away any root, ſhrub, or plant, or roots, ſhrubs, "or plants, of the value of 5s., and which ſhall be growing, "ſtanding, or being in the garden-ground, nurſery-ground, "or other incloſed ground of any perſon or perſons whom-"ſoever, ſhall be deemed guilty of felony, and ſubject to "the pains and penalties thereof: and the court before "whom the trial is had ſhall have authority to tranſport the "offender for 7 years in like manner as other felons, &c. "And perſons wilfully aiding, abetting, or aſſiſting therein, "or who ſhall buy or receive ſuch root, ſhrub, or plant, "roots, ſhrubs, or plants, of the value aforeſaid, knowing "the ſame to be ſtolen, ſhall be ſubject to the ſame puniſh-"ment as if they had ſtolen the ſame."

6 G. 3. c. 48. ſ. 3.

Then by another ſtat. of the ſame ſeſſion, (c. 48. ſ. 3.) "Every perſon who ſhall pluck up, or cut, ſpoil, or deſtroy, "or take or carry away, any root, ſhrub, or plant, roots, "ſhrubs, or plants, out of the fields, nurſeries, gardens, or "garden grounds, or other cultivated lands, of any perſon "or perſons, without the conſent of the owner or owners; "and ſhall be convicted thereof before one juſtice of the "peace, &c. ſhall forfeit for the firſt offence not exceeding "40s.; for the ſecond offence not exceeding 5l.; and if "any perſon ſo before convicted ſhall a third time commit "the like offence, and ſhall be thereof convicted, ſuch per-"ſon ſo convicted ſhall for ſuch third offence be deemed "guilty of felony; and the court before whom ſuch perſon "ſhall be tried ſhall have authority to tranſport ſuch perſon "for ſeven years to any of his majeſty's plantations in Ame-"rica, in like manner as other felons are directed, &c. by "the laws of this realm."

R. v. Hitchcock and Howe, Hil. 1788, MS. Buller J. & 2 MS. Sum. 225. (S. C. 2 Leach, 541.)

In the caſe of Hitchcock and Howe, eleven Judges preſent, in Hilary term 1788, all held that the firſt of theſe acts is not repealed by the ſecond; but they ſhall be conſidered as one act, being paſſed in the ſame ſeſſion. They ſaid it was mere

mere accident in what order the chapters in the ſtatute book were arranged; it depended on the will of the clerks of the parliament; and if the chapters were tranſpoſed in this caſe, there could be no doubt that the reſult of the two acts conſtrued together would be, that if the property taken or deſtroyed were of the value of 5s., and the fact were done in the night-time, it was felony under the former ſtatute; but that in all other caſes the offence muſt be proſecuted under the laſt act. But that the court were not obliged to tranſport the offender under the firſt act, but might paſs any other ſentence that could be paſſed for a ſingle felony. But by Buller J. If the two ſtatutes had been made in different ſeſſions, undoubtedly the laſt would have been a virtual repeal of the former.

Ch. XVI. § 28. *Garden roots, ſhrubs, &c.*

under the two acts conſtrued together, if the offence be committed in the night to the value of 5s. it is felony.

With reſpect however to the "ſtealing and taking away, or "maliciouſly pulling up or deſtroying any turnips, potatoes, "cabbages, parſnips, peaſe, or carrots growing or being in "any garden, lands, or grounds, open or incloſed," the offenders are by the ſtat. 13 Geo. 3. c. 32. ſubjected on a ſummary conviction before a juſtice of peace to a ſmall fine, or in default thereof to impriſonment in the houſe of correction. And the ſtat. of the 23 Geo. 2. as to the ſtealing of turnips is repealed.

Stat. 13 Geo 3. c. 32. *Stealing turnips, potatoes, &c. ſubjected to a ſummary juriſdiction.*

The like conſtruction applies to another ſubject of larceny contained in the foregoing ſtatutes. By the ſtat. 6 Geo. 3. c. 36. "Every perſon who ſhall *in the night-time* lop, top, "cut down, break, throw down, bark, burn, or otherwiſe "ſpoil or deſtroy, or carry away, any oak, beach, aſh, elm, "fir, cheſnut, or aſp timber-tree, or other tree ſtanding for "timber, or likely to become timber, without the conſent "of the owner or owners thereof firſt had and obtained, "ſhall be deemed guilty of felony and ſubject to the pains "and penalties thereof. And the court before whom ſuch "offenders are tried ſhall have authority to tranſport them "for ſeven years in like manner as other felons, &c. And "every perſon who ſhall be wilfully aiding, abetting, or aſ- "ſiſting in ſuch cutting down, breaking, throwing down, "barking, burning, or otherwiſe ſpoiling or deſtroying, or "carrying

§ 29. *Timber trees, &c.* 6 Geo. 3. c. 36. *Vide* laſt ſection.

Aiders and abettors, &c.

Ch. XVI. § 29. *Timber trees, &c.*

" carrying away any such oak, beach, &c. shall be subject " to the same punishment as if they had stolen the same."

6 Geo. 3. c. 48.

Then by the stat. 6 Geo. 3. c. 48. " Every person who " shall wilfully cut or break down, bark, burn, pluck up, lop, " top, crop, or otherwise deface, damage, spoil, or destroy, " or carry away any timber-tree or trees, or trees likely to " become timber, or any part thereof, or the lops or tops " thereof, without the consent of the owner or owners first " had, or in any of the king's forests or chaces, without the " consent of the surveyor, his deputy, or person entrusted " with the care thereof, shall on conviction before one jus- " tice of peace for the first offence forfeit a sum not exceed- " ing 20l. &c.; for a second offence not exceeding 30l. &c. " And if any person, so convicted, shall be guilty of the like " offence a third time, and shall be thereof convicted in like " manner (*a*), such person shall be deemed guilty of felony, " and the court before whom he shall be tried shall have " authority to transport him for 7 years in like manner as " other felons," &c.

Sect. 2. enacts, that " all oak, beach, chesnut, walnut, " ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, " shall be deemed timber-trees within *this* act." To which the stat. 13 Geo. 3. c. 33. adds poplar, alder, larch, maple, and hornbeam; in the same manner as if inserted in the last-mentioned act.

§ 30. *Lead, iron, &c. affixed to buildings.* 4 Geo. 2. c. 32.

By stat. 4 Geo. 2. c. 32. it is enacted, that " every per- " son who shall steal, rip, cut, or break, with intent to steal, " any lead, iron bar, iron gate, iron palisadoe, or iron rail " whatsoever, being fixed (*b*) to any dwelling-house, out-

(*a*) Mr. Burn, 4th vol. tit. Wood, s. 7. properly observes, that the words " *in* " *like manner*" here are inserted by mistake; for it could not be intended that a justice of peace should have a power of transporting a man. But he observes that the word *court* which afterwards follows, and which, as it seems by other parts of the act, means the assizes or sessions, implies a legal trial by jury. Perhaps those words were intended only to mean *by the like evidence.*

(*b*) In Hedge's case, O. B. May 1779, (reported in 1 Leach, 240.) the question turned on Whether the window sashes stolen were *fixed* to the freehold? and under the circumstances there stated it was ruled in the negative. In truth it was only a *temporary* fastening. *Vide* Sess. Pap. 276.

" houſe, coach-houſe, ſtable, or other building uſed or occu- Ch. XVI. § 30.
" pied with ſuch dwelling-houſe or thereunto belonging, or *Lead, Iron, &c. affixed to buildings.*
" to any other building whatſoever; or fixed in any garden,
" orchard, court-yard, fence, or out-let, belonging to any
" dwelling-houſe *or other building*, ſhall be deemed guilty of
" felony; and every ſuch felon and felons ſhall be ſubject to
" the like pains and penalties as in caſes of felony: and the
" court by and before whom ſuch perſon or perſons ſhall be
" tried ſhall have power to tranſport ſuch felons for ſeven
" years, in like manner as other felons, &c. All and every
" perſon who ſhall be aiding, abetting, or aſſiſting in ſtealing
" or in ſuch ripping, &c. or who ſhall buy or receive any *Vide* 29 Geo. 2. c. 30. as to receivers, poſt. f. 144.
" ſuch lead, iron bar, &c. knowing the ſame to be ſtolen,
" ſhall be liable to the ſame puniſhment as if he, ſhe, or they
" had ſtolen the ſame; any law to the contrary notwith-
" ſtanding."

By the ſtat. 21 Geo. 3. c. 68. intitled " an act to explain 21 Geo. 3. c. 68. *extending the ſame proviſions to copper, braſs, and bell metal.*
" and amend" the former act; after reciting the ſame, and that " the ſtealing of copper, braſs, and bell-metal affixed to
" dwelling-houſes and the appurtenances thereto is not there-
" by expreſsly prohibited and made puniſhable," enacts " that
" all and every perſon and perſons who ſhall ſteal, rip, cut,
" break, or remove with intent to ſteal any copper, braſs,
" bell-metal, utenſil, or fixture, being fixed to any dwelling-
" houſe, out-houſe, coach-houſe, ſtable, or other building
" uſed or occupied with ſuch dwelling-houſe or thereunto
" belonging, or to any other building whatſoever, or fixed in
" any garden, orchard, court yard, fence, or outlet belonging
" to any dwelling-houſe or other building, or any iron rails
" or fencing ſet up or fixed in any ſquare, court, or other
" place (ſuch perſon having no title or claim of title there-
" to), ſhall be deemed and conſtrued to be guilty of felony;
" and the court by and before whom ſuch perſon or perſons
" ſhall be tried and convicted, ſhall, and hereby have power
" and authority to tranſport ſuch felons for the term of ſeven
" years, in like manner as other felons are directed to be
" tranſported by the laws and ſtatutes of this realm; or to
" order and direct that ſuch offender be kept and detained
" in priſon, and therein kept to hard labour for any time not
" exceeding three years, nor leſs than one year; and within
" that

Ch. XVI. § 30. *Lead, iron, &c. fixed to buildings.*

"that time, if such court shall think fit, such offender shall "be once or oftener, but not more than three times, pub- "licly whipped: and all and every person and persons who "shall be aiding, abetting, or assisting in stealing, or in such "ripping, cutting, breaking, or removing any copper, brass, "bell-metal, utensil, or fixture fixed to any dwelling-house, "out-house, coach-house, stable, or other building, or fixed "in any garden, orchard, court yard, fence, or outlet, be- "longing to any dwelling-house, or other building, or any "iron rails, or fencing, set up or fixed in any square, court, "or other place; or who shall buy or receive any such cop- "per, brass, bell-metal, utensil or fixture, iron rails, or "fencing, knowing the same to be stolen, shall be subject "and liable to all and every the same punishments, pains, "and penalties, as if he, she, or they had stolen the same; "although the principal felon or felons has not or have not "been convicted of stealing the same; any law to the con- "trary in any wise notwithstanding."

§ 31. *Construction of the statutes.* Rex v. Parker and Easy, Suffolk Sum. Ass. June 1782, MS. Gould and Buller Js. and MS. Jud.

In the case of Parker and Easy, who were indicted on the stat. 4 Geo. 2. a majority of the Judges determined in Mich. term 1782 that a church was within the meaning of the words, "*or other building.*" It was there doubted whether those words must not be construed with reference to the same sort of buildings as were before expressed; particularly as the subsequent act of the 21 Geo. 3. c. 68. intitled an act to explain and amend the former, recites that the stealing of copper, &c. affixed to dwelling-houses *and the appurtenances thereto* was not expresly prohibited by that act, &c.; which latter statute being passed in pari materiâ might be considered as explanatory of the other. But Lord Mansfield said, there was a great difference between bringing a case within the equity of an act where it was not within the words, and taking a case out of the meaning of an act by an equitable construction, where it was within the words. That the first ought never to be done in a criminal case; neither ought the second, if the case were in equal mischief with others clearly within the meaning of the act. That here the words of the act comprised the case in question, and churches were equally within the mischief with dwelling-houses. But all

MS. Buller J.

the

the Judges agreed that the property of lead fixed to a church cannot be laid to be either in the churchwardens or in the inhabitants and parishioners; and it being so laid here, the conviction was holden wrong. Ch. XVI. § 21. *Lead, iron, &c. fixed to buildings.*

In the case of Hickman and Dyer, the indictment was for stealing so much lead "belonging to the Rev. C. G., clerk, and then and there fixed to a certain building called Hendon church;" the second and third counts were the same, only stating the lead to belong the one to "J. B. &c. the churchwardens of the parish; the other, to the inhabitants and parishioners." In Easter term 1785 the Judges, who had before been much divided in opinion, all held the indictment good on the first count (which laid the property in the vicar). But many of them thought that the better way of laying the case would be to allege the lead to have been "fixed to a certain building, being the parish church," &c. without stating the property to be in any one. Buller J. thought that charging it to be property was absurd and repugnant; property (in this respect) being only applicable to personal things; and that it should only be charged to be lead affixed to the church, or to a house belonging to such a person: and that the allegation as to property in this indictment should be rejected as surplusage. R. v. Hickman & Dyer. O. B. May 1784, 2 MS. Sum. 139. (*Vide* 1 Leach, 358) post. f. 599. *Vide* Watson's Clerg. Law. 391. the soil and freehold of the body of the church is in the vicar.

But where an indictment on the same statute charged the prisoner with stealing iron rails fixed to a tomb in a churchyard belonging to a certain building called Islington church; and laid respectively to be the property of the vicar, churchwardens, parishioners, and of a person unknown; and it appeared that the tomb was not connected by any building with the church; all the Judges, on reference to them, held that the offence laid was not within the statute. John Davis's case, O. B. Jan. 1792, MS. Jud.

John Senior was indicted on the statutes 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. for stealing *a window casement made of iron, lead, and glass*, the property of the Benchers of the Middle Temple, fixed to a certain building, &c. The court held that the case was not within the acts; for they do not mention *a casement*. The prisoner was afterwards indicted for a similar offence in the December sessions following before Wilson J. and acquitted on the authority of the above case. R. v. Senior, O. B. Sept 1788. cor Gould and Grose Js and Hotham B. and Adair Serjt. Recorder. 1 Leach, 559.

Ch. XVI. § 31. *Lead, iron, &c. fixed to buildings.*

Munday's case, O.B. Feb. 1799, 2 Leach, 991. *Stealing lead, &c. from house of which party had obtained fraudulent possession under pretence of lease is within the act.*

Robert Munday was indicted on the stat. 4 Geo. 2. c. 32. for stealing 200 cwt. of lead fixed to a house, &c. The property was laid in different persons. The house was to be let, and the prisoner under a false description of his situation and place of residence obtained possession of it under a treaty for a lease of it for 21 years, which was agreed to be executed: but immediately after he stripped it of all the leaden pipes, lead on the roof, &c.; and the jury found that he had entered into the contract for the purpose of getting a fraudulent possession of the house, and found him guilty of the charge. On the case being reserved for the opinion of the Judges, the printed report states that no opinion was publicly delivered, but the prisoner in May following had judgment of imprisonment for two years in the house of correction.

2 MS. Sum. 235. *Judgment for petit larceny within the acts.*

At the Old Bailey in January 1775 one was indicted on the stat. 4 G. 2. for stealing lead, and found guilty to the value of 10d., and had judgment to be whipped; by the opinion of Ashhurst and Nares Js. and the Recorder; and afterwards Lord C. J. De Grey, Burland B., and Gould J. were of the same opinion.

§ 32. *Black lead, &c. from mines.* 25 Geo 2. c. 10.

By the stat. 25 Geo. 2. c. 10. "it is enacted, that all and "every person or persons who shall unlawfully break, or by "force enter into, any mine or mines, wad-hole or wad-"holes of wad or black cawke, commonly called black lead, "or into any pit, shaft, adit, or vein of wad, black cawke "or black lead, with intent to take and carry away from "thence any wad, or black cawke, or black lead, or shall "unlawfully from thence take and carry away any wad, "black cawke, or black lead; although such mine or mines, "wad-hole or wad-holes, pit, shaft, adit, or vein, be not ac-"tually broken, or by force entered into by such offender or "offenders; or shall aid, abet, assist, hire, or command any "person or persons to commit such offence or offences as "aforesaid; that then, all and every such person or persons "shall be deemed guilty of felony: and it shall and may be "lawful for the court or Judge, before whom any such per-"son or persons so offending as aforesaid shall be lawfully "convicted, to order such offender or offenders to be com-

mitted

" mitted to the prison or gaol of the said county, appointed for criminals, or to some house of correction within the same county, for a time not exceeding one year; there to be kept to hard labour during all the said time, and to be publicly whipped by the common hangman, or by the master of such house of correction, at such times, and at such places, and in such manner, as such court or Judge shall think proper. Or it shall and may be lawful to and for such court or Judge, or for any other subsequent court held at the same place with the like authority as the former, to order such offender or offenders to be transported to some of his majesty's plantations beyond the seas for a term not exceeding seven years, as such court or Judge shall think most proper; and thereupon judgment shall be given that the person or persons so convicted shall be committed and whipped, or transported accordingly. And if transportation shall be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons. And if any such person or persons so committed or transported shall voluntarily escape, or break prison, or return from transportation before the expiration of the time for which he, she, or they shall be ordered to be transported, as aforesaid; such person or persons being thereof lawfully convicted shall suffer death as a felon, without benefit of clergy; and shall be tried for such felony in the county where he, she, or they so escaped, or where he, she, or they shall be apprehended."

Ch. XVI. § 32. *Black lead from mines.*

By stat. 39 & 40 Geo. 3. c. 77. s. 5. " if any person shall steal or take away any coal, culm, or coak, wood, iron, ropes, or leather, not exceeding the value of 5s. from any bank, yard, wharf, or other place, belonging to any manufacturer or coal-dealer, or off or out of any boat, barge, waggon, cart, or other carriage; or shall steal or embezzle any tools or implements used for cutting or getting coal, culm, or other minerals, not exceeding the value above mentioned; and shall on complaint of the owner or his agent be convicted before one or more justices of peace," &c. he is subjected to certain penalties, or im-

§ 33. *Coals, &c. severed.* 39 & 40 Geo. 3. c. 77. " An act for the " security of " collieries and " mines," &c. *Tools, &c. for cutting.*

Ch. XVI. § 33. *Coals, cutting tools, &c.*

Vide tit. Cheats.

priſonment in lieu thereof or until payment: and no perſon convicted of any offence under this act ſhall be liable to be proſecuted for the ſame offence under any other law. By the ſame act, ſ. 4. "Whereas miners often defraud each "other by conveying away iron ſtone from one heap unto "another; if any perſon ſhall take and remove any iron ſtone "or iron ore, with intent to defraud the perſon or perſons "who ſhall have raiſed the ſame, he ſhall, on a ſummary "conviction before a juſtice of peace, be impriſoned not "exceeding three months."

§ 34. *Charters and writings touching the realty.* 3 Inſt. 109. Staundf. 25. b. 1 Hawk. ch. 33. ſ. 22. 1 Hale, 510. 2 Roll. Abr. 58. Weſtbeer's caſe, O. B. 1739, cor. Lord Ch. B. Comyns and Chapple J. MS. Tracy, 66. (S. C. 1 Leach, 14.)

As larceny cannot be committed of things real at common law, neither can it be committed of charters or other written aſſurances concerning the realty, becauſe they ſavour of the ſame nature; or as ſome writers ſay, becauſe they are not in themſelves of any value; though Lord Coke and Staundford give the ſame rule as to the box or cheſt in which they are kept, to which the latter reaſon would not apply. Upon an indictment for larceny, a ſpecial verdict was found, ſtating that the priſoner was guilty of privately taking away a parchment writing value 1 d. from the records of the Six Clerks' office, purporting to be a commiſſion under the Broad Seal; (it was a commiſſion for aſcertaining the boundaries of two manors purſuant to an order made in a cauſe in Chancery; and this was laid to be the goods of the king:) and another parchment writing annexed thereto value 1 d., purporting to be the return to the ſaid commiſſion, (which was laid to be the goods of perſons unknown,) with intent to ſteal the ſame. But the court were unanimouſly of opinion, that as theſe parchment writings concerned the realty, no larceny could be committed of them.

§ 35. *Records.* 8 Hen. 6. c. 12. ſ. 3. 1 Hale, 615.

By the ſtat. 8 H. 6. c. 12. ſ. 3. "If any record or parcel "of the ſame, writ, return, panel, proceſs, or warrant of "attorney, in the king's courts of Chancery, Exchequer, "the one Bench or the other, or in his Treaſury, be wil- "lingly, ſtolen, taken away, withdrawn, or avoided by any "clerk, or by other perſon; becauſe whereof any judgment "ſhall be reverſed; ſuch ſtealer, taker away, withdrawer, "or avoider, their procurers, counſellors, and abettors, "thereof

" thereof indicted and by proceſs thereupon made thereof, " duly convicted by their own confeſſion, or by inqueſt (viz. " half of which ſhall be of the men of any of the ſame courts, " (i. e. officers,) and the other of other men, (i. e. of com- " mon jurors) ſhall be guilty of felony." And the inquiry ſhall be before the Judges of the one or the other Bench. Though acceſſaries before only are named in the ſtatute, yet there may be acceſſaries after by general conſtruction of law. This ſtatute only extends to the courts expreſsly named, and to the court of Chancery ſo far only as it proceeds according to the courſe of the common law. And it does not extend to the Judges; becauſe clerks are firſt named who are inferior to them. But Judges in all caſes, as well as others in caſes not made felony by the above-mentioned act, are by the ſtat. 8 Rich. 2. c. 4. to pay a fine to the king, and make ſatisfaction to the party, for falſely entering pleas, or raſing rolls, or changing verdicts, to the diſheriſon of any one.

Ch. XVI. § 35. *Records.*

4 Blac. Com. 128. 1 Hawk. ch. 45. ſ. 3, 4, 7. 3 Inſt. 72. 1 Hale, 649.

8 Ric. 2. c. 4.

In an indictment on this ſtatute the offence muſt be laid to be done *willingly* as well as felonioufly.

3 Inſt. 72. 1 Hale, 650.

The juſtices of either Bench have a concurrent authority: they who firſt inquire ſhall proceed, and need no ſpecial commiſſion if the offence be committed in the county where they ſit. But if the offence be partly committed in one county and partly in another, ſo as not to amount to a complete offence in either, the party cannot be indicted in either for a felony, but only for a miſdemeanor. But though the trial is to be by a jury of the deſcription before deſcribed, yet the indictment may be found by a grand jury of either or any deſcription.

1 Hawk. ch. 45. ſ. 6. 8. 1 Hale, 651.

§ 36.

In order to make the ſtealing of goods felony, they ought to have ſome worth in themſelves, and not merely from their relation to ſome other thing: and therefore bonds, bills, notes, and other ſecurities, which concern mere choſes in action, were not the ſubjects of larceny at common law; being of no intrinſic value, and not importing any property in poſſeſſion of the perſon from whom they are taken. But now by ſtat. 2 Geo. 2. c. 25. ſ. 3. it is enacted, " that if " any perſon or perſons ſhall ſteal or take by robbery any " exchequer orders, or tallies, or other orders, entitling

Bonds, bills, orders, warrants, tallies, &c.

2 MS. Sum. 247. 4 Blac. Com. 234. 1 Hawk. ch. 33. ſ. 22.

2 G. 2. c. 25. ſ. 3. made perpetual by 9 G. 2. c. 18.

Ch. XVI. § 36. *Bonds, bills, orders, warrants, tallies, &c.*

" any other perſon or perſons to any annuity, or ſhare in any " parliamentary fund, or any Exchequer bills, Bank notes, " South-Sea bonds, Eaſt-India bonds, dividend-warrants of " the Bank, South-Sea company, E. I. company, or any " other company, ſociety, or corporation, bills of exchange, " navy bills, or debentures, Goldſmiths' notes for the pay- " ment of money, or other bonds, or warrants, bills, or " promiſſory notes, for the payment of any money, being " the property of any other perſon or perſons, or of any cor- " poration; notwithſtanding any of the ſaid particulars are " termed in law a choſe in action; ſhall be deemed guilty " of felony of the ſame nature, and in the ſame degree, and " with or without the benefit of clergy, in the ſame manner " as it would have been if the offender had ſtolen or taken " by robbery any other goods of like value with the money " due on ſuch orders, tallies, bills, bonds, warrants, deben- " tures, or notes, or ſecured thereby, and remaining unſa- " tisfied; and ſuch offender ſhall ſuffer ſuch puniſhment as " he or ſhe ſhould or might have done if he or ſhe had ſtolen " other goods of the like value with the monies due on ſuch " orders, &c. reſpectively, or ſecured thereby and remain- " ing unſatisfied."

As to what is a warrant for payment of money, *vide* ante, ſ. 22. & tit. Forgery.

§ 37. *Conſtruction of the act* Haſſell's caſe, O.B. Oct. 1730, cor. Ld. C. J. Raymond, Denton J. and Comyns B. Leach, 1. East. T. 1781, MS. Gould J. *A bill payable to order but not indorſed.*

Though the ſtatute mentions bank notes, &c. in the plural number, yet the ſtealing of a ſingle bank note is within it, particularly on account of the words which follow, " notwithſtanding *any* of theſe particulars may be termed in " law *a choſe in action*."

At a conference of the Judges in Eaſter term 1781, Nares J. mentioned that a perſon was convicted before him for privately ſtealing from the perſon of another a pocket book containing a note of the Briſtol bank, ſigned by ſome one on behalf of himſelf and partners, promiſing to pay to the proſecutor or order a ſum of money, but which the proſecutor had not indorſed. All the Judges were of opinion that this was a capital felony within the ſtat. 22 Geo. 2. c. 25. which makes the ſtealing promiſſory notes, &c. felony with the ſame conſequences as goods of the like purported value: that this was a promiſſory note; and its not being indorſed was immaterial.

Maria

Ch. XVI. § 37. *Bonds, bills, orders, warrants, tallies, &c.*

Maria Thereſa Phipoe was indicted on the ſtat. 2 Geo. 2. c. 25. for robbing John Courtoy in a dwelling-houſe, and taking from him a promiſſory note value 2000l., ſigned by J. Courtoy againſt the ſtatute. In another count the note was laid to be the property of Courtoy. It appeared in evidence that the proſecutor had been inveigled to the priſoner's houſe, where he was detained by force for three hours, and compelled under a menace of death to draw the promiſſory note in queſtion, (on a ſtamped paper previouſly prepared by the priſoner) dated the 30th of March 1795, for 2000l., payable at two months to the priſoner or order; which the priſoner attempted to get diſcounted the next day without ſucceſs, and which was found in her poſſeſſion when ſhe was apprehended. After conviction, a caſe was reſerved for the opinion of the Judges, which was argued before them at Serjeant's-Inn hall on the 4th of Feb. 1796; and two objections were urged on the priſoner's behalf. 1ſt, That this was no robbery within the ſtat. 2 Geo. 2. c. 25. the note being of no value while in the hands of the proſecutor; and the ſtatute only extending to ſecure valid exiſting ſecurities in the poſſeſſion of the party robbed. That nothing could be ſaid to be due on this note as the ſtatute required. That the note never was the property, nor in the poſſeſſion of Courtoy; the paper and ſtamp being the property of the priſoner, and never out of her poſſeſſion. That property implied dominion, which Courtoy never had for a moment. That the priſoner had obtained the note by dureſs and not by ſtealing. 2dly, It was objected that the indictment was bad, becauſe it ſtated the offence to have been committed againſt the form of the ſtatute, and not of the ſtatutes, the ſtat. 2 Geo. 2. c. 25. having once expired, and been revived by the ſtat. 9 Geo. 2. c. 18.

Phipoe's caſe, O.B. May 1795, cor. Groſe J. MS. Jud. S.C. 2 Leach, 774.

Where one was compelled by dureſs to make a promiſſory note on ſtamped paper before prepared by the priſoner who was preſent during the time, and withdrew the note as ſoon as it was made; held not a ſtealing or robbery of the note within the ſtatute; for according to ſome that is confined to available ſecurities in the hands of the party robbed, which this was not, being of no value while in the hands of the maker himſelf: But even if it were, yet by others, this was never in his poſſeſſion; his ſignature having been procured by dureſs to a paper which during the whole continuing tranſaction was in the poſſeſſion of the priſoner.

To the firſt objection it was anſwered, that the ſtatute intended to put the ſecurities mentioned therein upon the ſame foot as the money they repreſented. That property conſiſting in the right of diſpoſing; and Courtoy, having by the means employed been deprived of the right of diſpoſing of the 2000l. thereby transferred to the priſoner, had therefore been deprived of ſo much property within the meaning of the act. That if the money had been actually received

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upon the note, there could have been no doubt, and the ſtatute made the taking the ſecurity as penal as taking the money ſecured. That for an inſtant the proſecutor had both the poſſeſſion and the property of the note in him, and the priſoner was guilty of a treſpaſs in taking it away from him. As to the ſecond objection, it was anſwered, that a ſtatute continuing or reviving another was not the ſtatute creating the offence, but that the offence was referable to the original ſtatute alone: and three ſeveral precedents were referred to on this ſubject; 1. The caſe of Robert Clark, who was convicted on an indictment at the O. B. Sept. 1791, for ſtealing money, goods, and a bank note. 2. The caſe of J. Randal, convicted at the O. B. May 1792, for ſtealing a note in a houſe, and afterwards executed. 3. The caſe of Lawrence Jones, convicted of the ſame offence at the October Seſſions 1793; in all which the indictments concluded againſt the form of the ſtatute.

Upon the firſt and principal point there was a difference of opinion amongſt the Judges; nine of them expreſsly held that the offence was not within the ſtatute. Some of thoſe, amongſt whom was Lord Kenyon, thought that the ſtatute was only intended to protect exiſting available notes in the hands of the perſon from whom they were taken, and that this note did not come within that deſcription, being of no value in the hands of the proſecutor. Others inclined to think that the note was of value from the moment it was drawn; but that it never was in the poſſeſſion of the proſecutor, but continued all the time in the poſſeſſion of the priſoner herſelf, by whoſe dureſs the proſecutor was compelled to make it. And in particular Eyre C. J. obſerved, that the property never exiſted till the force, but aroſe out of it; and therefore it was different from the caſe of money. And admitting that if the proſecutor had brought the note in his pocket, it would have been a caſe within the act, though the note would not be available while in his poſſeſſion (upon which point he ſhould have heſitated;) yet this was not that caſe. But all the nine Judges conſidered that the whole tranſaction was one continued act, and that the note was procured by dureſs, and not by ſtealing. One of the Judges (Aſhhurſt J.) who differed, thought that it was not a ſingle act;

act; but that there was a distinguishable interval between the writing of the note and the actual taking of it by the prisoner, during which the prosecutor had the possession of it; and that therefore it was taking from him an instrument of value within the meaning of the statute, as it would have been available against him in the hands of an innocent holder. On this ground also Macdonald C. B. doubted: and the other Judge (Buller J.) was absent.

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Upon the second point it became unnecessary to give any opinion. But those Judges who adverted to it thought the form of the indictment good; and that the *re-enacting* (*a*) statute was the only statute in force against the offence. And so it was afterwards expressly holden in the case of William Morgan, who was convicted before Lawrence J. at Reading Lent assizes 1796, upon an indictment for stealing Bank notes against the form of the statute. With which Thomson B. whom he consulted on the occasion declared his concurrence; considering the-reviving statute as in effect re-enacting the provisions of the expired law.

Form of indictment laying offence against the form of the statute, good. Morgan's case, MS. Jud.

In the case of Sadi and Morris, which is elsewhere stated more at large, it was determined by all the Judges to be improper to lay Bank notes to be *chattels;* but it was also their opinion that that word might be rejected as surplusage, if the indictment were in other respects sufficient. They were there laid to be "the property and chattels" of S. S. in the count against the receiver.

R. v. Sadi and Morris, O. B. 1787, MS. Buller J. S. C. post. 143. and *vide* Sess. Pap. of Feb. 1788, p. 221. for the reasons of the judgment.

An indictment against Richard Craven upon the stat. 2 Geo. 2. c. 25. charged him with stealing *a certain note commonly called a Bank note,* of the value of 1l. of lawful money, &c. marked, &c. dated, &c. and signed by A. Hooper for the Governor and Company of the Bank of England; by which said note the said A. Hooper for the said Governor, &c. did promise to pay to Mr. Abraham Newland, or bearer, on demand, the sum of 1l., the said note being the property of one T. Y.; and the said sum in the said note mentioned and secured, &c. then, &c. being due and unsatisfied to the said T. Y. the proprietor thereof; against the form of the

Craven's case, Lancaster Sum. Ass. 1801, cor. Lord Alvanley, MS. Jud. *How Bank notes to be described in indictment.*

(*a*) 2 Hale 173. and Cro. Eliz. 750. which were cited, agree; but refer the offence to the *first* statute.

statute,

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ſtatute, &c. After conviction, on objection taken to the generality of the deſcription of the Bank note in the indictment, all the Judges on reference to them in Mich. term 1801, held the indictment ill laid; as in deſcribing the property ſtolen to be "*a note commonly called a Bank note*," it did not follow any of the deſcriptions of property in the ſtatute, and in other reſpects ſeemed inaccurate.

R. v. Auſtin and King, Leiceſter Lent Aſſ. 1783, MS. Gould and Buller Js. *Indictment for ſtealing a bill in L. ſuſtained by proof that when found in poſſeſſion of priſoner there it had an indorſement (made afterwards) and not laid in indictment.*

Mr. Baron Perryn reported to the Judges, that W. Auſtin and J. King were indicted for ſtealing a bill of exchange; and it appeared that when the bill was ſtolen from the proſecutor at Mancheſter, the names of John Halton and Luke Wigan only were indorſed thereon; but when it was negotiated by the priſoner Auſtin at Leiceſter, the name *Thomas Watts* was added to the two other indorſers. It was objected for the priſoner, that this being an indictment in Leiceſter, for *then and there* ſtealing a bill of exchange, whereon the names of John Halton and Luke Wigan were indorſed, it was not ſupported by evidence of a bill with the additional name of *Watts* indorſed thereon, at the time of the negotiation thereof by the priſoner in Leiceſter. But it was reſolved in Eaſter term 1783 by all the Judges, that the addition of the third name made no difference: it was the ſame bill that was originally ſtolen: and that therefore the priſoner was properly convicted.

Milnes's caſe, Worceſter Sum. Aſſ. 1800, MS. Jud. *Indictment for larceny of a promiſſory note may deſcribe it generally, as "one "promiſſory note "for the payment "of one guinea;" without ſetting the note forth; and if the value of the thing ſtolen in the dwelling houſe (including the note) be 40s. clergy is ouſted.*

(Lawrence J. abſent.)

Peter Milnes was indicted before Heath J. for ſtealing in a dwelling-houſe goods and chattels to the value of 33s., and alſo a promiſſory note for the payment of one guinea, and alſo one other promiſſory note for the payment of five guineas, all which ſaid notes were the property of J. M., and were due and unſatisfied. The priſoner was convicted; and a queſtion was reſerved for the opinion of the Judges, Whether the priſoner were entitled to his clergy? which depended on this, whether the notes were ſufficiently deſcribed in the indictment? At a conference in Mich. term 1800 many precedents were adduced of indictments drawn in the ſame general manner with reſpect to Bank notes and Bank poſt bills, ſome of them alſo including private promiſſory notes. And all the Judges held the indictment well laid, and the conviction proper.

The

The ſtealing of ſecurities, money, or other effects of the Bank of England by their officers or ſervants, was conſidered before. Ch. XVI. § 37. *Bonds, bills, orders, warrants, tallies, &c.*

§ 38. *Letters.*

In addition to the proviſions before adverted to againſt embezzlements by officers and ſervants in the poſt office, it is alſo further enacted by ſtat. 7 Geo. 3. c. 50. ſ. 2. "that "if any perſon or perſons ſhall rob any mail or mails, in "which letters are ſent or conveyed by the poſt, of any let- "ter or letters, packet or packets, bag, or mail of letters; "or ſhall ſteal and take from or out of any ſuch mail or "mails, or from or out of any bag or bags of letters ſent or "conveyed by the poſt, or from or out of any poſt-office or "houſe or place for the receipt or delivery of letters or "packets ſent or to be ſent by the poſt, any letter or letters, "packet or packets; although ſuch robbery, ſtealing or "taking ſhall not appear or be proved to be a taking from "the perſon, or upon the king's highway, or to be a robbery "committed in any dwelling-houſe, or any coach-houſe, "ſtable, barn, or any out-houſe belonging to a dwelling- "houſe; and although it ſhould not appear that any perſon "or perſons were put in fear by ſuch robbery, ſtealing, or "taking; yet ſuch offender or offenders being thereof con- "victed as aforeſaid, ſhall be deemed guilty of felony, with- "out benefit of clergy."

7 Geo. 3. c. 50. ſ. 2. *Vide* 5 Geo. 3. c. 25. ſ 18. Ante, ſ. 21.

Embezzlements by perſons employed in the poſt-office have been before conſidered. Ante, ſ. 21.

§ 39. *Conſtruction of of the acts.*

Noah Pearce, intending to ſteal the mail bags, went one night about the uſual time to the poſt-office at High Wycombe, and pretending to be the mail guard, obtained from the perſon who was there the bags of letters, which were let down to him from out of the window of the poſt-office by a ſtring, from whence he took them, and immediately made off. Being indicted on the ſtat. 7 Geo. 3. and found guilty; all the Judges were of opinion in Hilary term 1793 that the conviction was proper on a count in the indictment for ſtealing the letters out of the poſt-office. For his artifice in obtaining the delivery of them in the bag out of the houſe was the ſame as if he had actually taken them out himſelf.

Noah Pearce's caſe, Buckingham Sum. Aſſ. 1794, cor. Ld. C. J. Eyre, MS. Buller J. and MS. Jud. *Fraudulently obtaining the mail by delivery from one in the poſt-office to the priſoner without is a ſtealing out of the poſt-office.* *Vide* poſt. ſ. 104.

James

Ch. XVI. § 39. *Letters, mails, &c.*

Howatt's case, Lancaster Sum. Ass. 1795, cor. Rooke J. MS. Jud.

A letter carrier taking letters out of the office, intending to deliver them to the owners but to embezzle the postage, cannot be indicted for stealing such letters under stat. 7 Geo. 3. c. 50. s. 2.

James Howatt was indicted on the 2d section of the stat. 7 Geo. 3. c. 50. 1st, for stealing out of the London bag sent by the General Post-office from London to Manchester divers letters specified; 2dly, 3dly, and 4thly, for stealing the like letters respectively out of the post-office in M., and out of a certain house for the receipt and delivery of letters sent by the post, and out of a certain place for the same. It appeared to be the duty of the clerks in the office to count the letters and deliver them out to the letter carriers, of whom the prisoner was one. That he contrived to obtain possession of some of the letters before they were so counted out to him, and was detected with them in his pocket in the letter-carrier's room, which is under the same roof as the office, separated therefrom only by some steps. For some time previous there had been a great deficiency in the receipt of the postage, though there was no complaint of the miscarriage of any letters: and from circumstances it appeared, and so the jury found when they convicted the prisoner, that he intended to have delivered the letters, and only to have embezzled the postage. But in Mich. term 1795 the Judges upon a conference (absent Hotham B.) all agreed that this was not a stealing within the act. It was indeed at first suggested by two of the Judges in the course of discussing the point, that inasmuch as the act of the prisoner deprived the crown of its lien, though there were no intention to defraud the true owner, it was as much larceny as stealing from a pawn-broker; and that the clause in question was positive, without adverting to the view with which the act was done. On the other hand it was observed, that the two first clauses respected the safe carriage of letters, and seemed to be confined, as appeared further by the preamble, to a taking to the prejudice of the owner. That the third clause was for the protection of the revenue, which though it did not reach this case went to shew, that the legislature did not mean to protect the revenue by the antecedent clauses. That if the letters had been so taken by those to whom they were directed, it would not have been within the clause in question of the act. Though if it were a question of larceny at common law, it would be equally larceny in the owner. But at any rate, this was an indictment on the statute, and not for taking the

goods of such an one, as was charged in an indictment for stealing the goods of a bailee; and therefore all agreed that the conviction was wrong on the finding of the jury on this indictment.

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In a prosecution on the stat. 7 Geo. 3. c. 50. s. 1. against one employed in the business of the post-office as a post-boy and rider in carrying letters, &c. for secreting and stealing certain bills of exchange contained in a letter sent by the post, which came to his possession in his said employment; it is no variance to describe in the indictment such letter as one "to be delivered to persons using in trade the name and firm of *Messrs.* B., N., and H.; which word *Messrs.* was frequently added to their address in the direction of letters and other papers received in business; though they themselves in drawing or indorsing bills, making out invoices, and the like, wrote themselves B., N., and H., without ever adding *Messrs.* as part of their firm. For if they accepted bills directed to them in that manner, it would be a using of that firm. So it is sufficient to allege in part description of the bills so secreted and stolen, that they were *subscribed* by A. and B., without saying that they were drawn or made by them.

John Dawson's case, Lancaster Sp. Ass. 1801, cor. Chambre J. and before all the Judges Trin. Term 1801, MS. Jud. *Description of the letter.*

Thomas Thomas was indicted on the stat. 5 Geo. 3. c. 25. s. 18. and 7 Geo. 3. c. 50. s. 2. First for robbing the mail in which letters were sent by the General Post from Bristol to London of one letter directed, &c. against the form of the stat.; and 2dly, for stealing and taking out from out of a certain bag of letters, called the Bristol bag for London, then and there sent by the post from Bristol to London, one letter directed, &c. Both these offences were charged to have been committed in the county of Middlesex; and the trial was had at the Old Bailey. It was proved that the Bristol bag was put with the rest in the mail box at Bristol; that the prisoner on the same night went on the outside of the mail coach from Bristol to London; and that some part of the way, in the counties of Wilts and Berks, he sat on the guard's seat, from whence he was enabled to open the mail box in which the bags were, and take out some of its contents. That he rode upon the coach box the rest of the journey, and left the coach at Hyde Park Corner. There was no doubt of the fact of the prisoner's having taken the letters out of the mail

Thomas's case, O. B. Dec. 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 723.) *The indictment for robbing mail bag of letters must be laid in the county where the mail was actually taken in order to bring the case within the statute; and cannot be laid in the county where only the prisoner was in possession of it; the jury finding that the letters were taken from the bag in some other county through which the mail had passed.*

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mail bag, the seal of which had been broken, and the contents of some of the letters were traced to him; but it was objected that there was no evidence to prove the offence to have been committed in Middlesex, but on the contrary either in Wilts or Berks. To this it was answered, that the offence was not complete till the prisoner had quitted the coach, which was in Middlesex; or at any rate, having possession of the letters there, it was a new taking and offence in that county. The jury found the prisoner guilty, and that the letters were not taken out of the bag in Middlesex, but in one of the other counties. But upon reference to the Judges in Hilary term 1795, they held the conviction bad; the offence not having been proved where it was laid.

It may be remarked upon the above statutes, that they do not make the stealing of letters generally a capital offence, but the stealing them from the places particularly specified; which is a definite act, local in its nature, and cannot be extended by construction to a new taking in every county in which the thing stolen is conveyed, as in the case of simple larceny.

§ 40. *Waifs, wreck, &c.*
1 Hawk. ch. 33. s. 24.
1 Hale, 510.
Pult. de pace, 131.
2 MS. Sum 250.
26 Geo. 2 c. 19.
Vide post. Larceny from Ships.

It is generally said that larceny cannot be committed of that wherein none have any determinate property, as of treasure-trove, waifs, &c. till seized. The same was said of wreck; but now the legislature have by a most just and humane statute (26 Geo. 2. c. 19.), protected the owners of property in this state against the odious plunderers of it. And indeed there seems to be some incorrectness in the generality of the position with respect to the other things mentioned. As waifs, treasure-trove, &c. the lord has no determinate property in them till seizure; but the true owner, though unknown, who has lost or been robbed of the things themselves, has still a property in them. Pulton therefore assigns the uncertainty of the true owner, as the reason why they are not the subject of larceny; a reason which, though not true to the full extent of it, does at least imply that if the owner be known, larceny may be committed of them. Where indeed the circumstances of the case furnish a presumption of an intended dereliction of such property

property on the part of the owner, there no larceny can be committed before seizure by the lord, because the taking is not invito domino.

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§ 41. *Animals feræ naturæ.*

It is however certain, that larceny cannot be committed of such animals in which there is no property, as of beasts that are feræ naturæ and unreclaimed; such as deers, hares, and conies in a forest, chase, or warren; fish in an open river or pond; old pidgeons out of the house; or wild fowls at their natural liberty: although any person may have an exclusive right ratione loci aut privilegii to take them if he can in those places. But if they are dead, reclaimed, and known to be so, or confined and may serve for food, it is otherwise even at common law. For of deer so inclosed in a park, which may be taken at pleasure; fish in a trunk or net, or as it should seem in any other inclosed place which is private property, and where they may be taken at the pleasure of the owner at any time; pheasants or partridges in a mew; young pidgeons, or old ones when shut up; young hawks in a nest, and even old ones, or falcons reclaimed and known by the party to be so; larceny may be committed. The same as to peacocks: so of swans marked and pinioned, or swans unmarked, if tame, kept in a mote, pond, or private river: but if they range out of the royalty, it is no felony to take them though marked, because it cannot be known that they belong to any person. Nor can larceny be committed of the eggs of these, or of hawks; because the stat. 11 H. 7. c. 17. has appointed a less punishment, namely, fine and imprisonment. But the stealing a stock of bees seems to be admitted to be felony.

Staundf. 25. b. 3 Inst. 109, 110. 4 Blac. Com. 235, 6. 1 Hale, 510, 511. 1 Hawk. ch. 33. s. 25. to 28. Sum. 67, 8. 3 Lev. 227. Davies v. Powell, Willes' Rep. 49.

Owen, 20. Cro. Car. 553. *Vide* post. more of fish.

Vide stat. 37 Ed. 3 c. 19. 3 Inst 97, 8, 9. 1 Hale, 642. 18 H. 8. 2 pl. 11.

Tibbs v Smith, Ray. 33.

John Rough being convicted on an indictment for stealing a pheasant, value 40 s., of the goods and chattels of H. S.; all the Judges on a second conference in Easter term 1779, after much debate and difference of opinion, agreed that the conviction was bad; for in cases of larceny of animals feræ naturæ, the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add "of the goods and chattels" of such an one.

John Rough's case, Surrey Lent Ass. 1779, MS. Buller J. 2 MS Sum. 251. 3 MS. Sum. 43. and MS Crown Cas. Ref.

By

Ch. XVI. § 42. *Deer.*

§ 42. *Deer.* 1 H. 7. c. 7.

By ſtat. 1 H. 7. c. 7. the unlawful hunting in any foreſt, park, or warren, being private property, in warlike array, by night, or with painted faces, &c. was made felony. But the uſe of that ſtatute, which ſeems principally to have been levelled at public diſturbers of the peace, is ſuperſeded by the more general law of the 9 Geo. 1. c. 22. "whereby "If any perſon or perſons, being armed with ſwords, fire-"arms, or other offenſive weapons, and having his or their "faces blacked, or being otherwiſe diſguiſed, ſhall appear "in any foreſt, chaſe, park, paddock, or grounds incloſed "with any wall, pale, or other fence, wherein any deer "have been or ſhall be uſually kept, or in any warren or "place where hares or conies have been or ſhall be uſually "kept; or in any high road, open heath, common, or "down; or ſhall unlawfully and wilfully, hunt, wound, "kill, deſtroy, or ſteal any red or fallow deer; or unlaw-"fully rob any warren or place where conies or hares are "uſually kept; or ſhall unlawfully ſteal or take away any "fiſh out of any pond or river; or if any perſon or perſons "(i. e. whether armed and diſguiſed or not,) ſhall unlawfully "and wilfully hunt, wound, kill, deſtroy, or ſteal any red "or fallow deer, fed or kept in any places in any of the "king's foreſts or chaſes, which are or ſhall be incloſed "with pales, rails, or other fences, or in any park, pad-"dock, or grounds incloſed, where deer have been or ſhall "be uſually kept," &c.

By deer ſtealers, armed and diſguiſed. 9 Geo. 1. c. 22. ſ. 1. *made perpetual by* 31 G. 2. c. 42. ſ. 2. *Deer.*

Whether armed and diſguiſed or not.

Reſcuing ſuch offenders.

"Or ſhall forcibly reſcue any perſon being lawfully in "cuſtody of any officer or other perſon for any of the of-"fences before mentioned," &c.

Procurers.

"Or ſhall by gift or promiſe of money or other reward, "procure any of his majeſty's ſubjects to join him or them "in any ſuch unlawful act; every perſon ſo offending, be-"ing thereof lawfully convicted, ſhall be guilty of felony "without benefit of clergy."

Surrender clauſes. Vide tit. Proceſs to bring in the party.

By ſ. 2. and ſubſequent ſections, proviſions are made for attainting ſuch offenders not ſurrendering themſelves on proclamation, as therein directed; which will be ſet forth elſewhere.

By ſ. 14. "Every offence committed contrary to this act, "ſhall and may be inquired of, examined, tried, and deter-"mined

Ch. XVI. §. 42. *Deer.*

"mined in any county within England, in such manner "and form as if the fact had been therein committed." Corruption of blood, &c. is saved.

But that part of the clause which relates to the unlawfully and wilfully hunting, wounding, killing, destroying, or stealing any red or fallow deer in any forest, chace, or inclosed places, where deer have been or shall be usually kept, (not being armed and disguised,) was holden by all the judges in Davies' case to be repealed by stat. 16 G. 3. c. 30. which punishes the first offence with a pecuniary forfeiture (*a*); and then enacts (s. 1.) "That if any person or persons, after having been convicted of any of the aforesaid "offences, shall offend a second time against this act, by "committing any of the aforesaid offences; such second "offence, whether it be the same as the first offence, or be "any other of the aforesaid offences, shall be deemed and "adjudged to be felony," and the offender, on conviction by indictment shall be transported for seven years. Consonant to the above construction, no indictment lies for deer-stealing in the first instance, although it be laid that the deer was reclaimed. And though the statute only mention red or fallow deer, yet the cross breeds, such as what is called a bastard me-

16 G. 3. c. 30. R. v. Davies, Mich. 1783, MS. Gould and Buller Js. (S. C. 1 Leach, 306.)

Thomas Heath's case, Sarum, March 1801, and afterwards before all the Judges. MS. Jud.

(*a*) That act, (the 16 G. 3. c. 30.) reciting that the statutes then in force for the discovery and punishment of deer stealers are numerous, and many of them ineffectual; and that the purposes thereby intended might be better effected if such as are found defective were repealed, and the good provisions therein contained, together with such further provisions as may be expedient, were reduced into one act; then enacts, "that if any person shall course or hunt, or shall take in any "slip, noose, toil, or snare, or shall kill, wound, or destroy, or shall shoot at "or otherwise attempt to kill, wound, or destroy, or shall carry away any red or "fallow deer, in any forest, chace, purlieu, or ancient walk, whether inclosed or "not, or in any inclosed park, paddock, wood, or other inclosed ground where "deer are, have been, or shall be usually kept, without the consent of the owner, "or without being duly authorised; or shall be aiding, abetting, or assisting there"in or thereunto; every person so offending by courting, hunting, shooting at or "otherwise attempting to kill, wound, or destroy, or by aiding therein or there"unto, shall forfeit for every such offence 20 *l.* and every person so offending by "killing, wounding, or destroying, or by taking in any slip, noose, toil, or "snare, or by carrying away, or by aiding therein respectively, shall for every "deer so wounded, killed, destroyed, taken, or carried away, forfeit 30 *l.*" [doubling the penalty in case of a keeper or person entrusted.]

The last section but one of the act repeals many statutes or parts of them concerning deer from 13 Ric. 2. to 10 Geo. 2. both inclusively, which are particularly enumerated; but the above stat. of 9 Geo. 1. is not mentioned.

Ch. XVI. § 42. *Deer.*

nald, bred from a menald buck and a fallow doe, are within the act.

§ 43. *Fish.*

Ante, i. 41, 42. 9 G. 1. c. 22. 1. 1. 1 Hale, 511. Foft. 366.

It has been juſt noted that the ſtealing of fiſh out of any river or pond by perſons armed and diſguiſed, or forcibly reſcuing ſuch offenders, or procuring ſuch offence, is made a capital felony by the ſtat. 9 Geo. 1. c. 22. But ſomething more is required to be ſaid as to the taking of fiſh, in addition to the proviſion already referred to in the black act reſpecting offenders of this deſcription, armed and diſguiſed as therein ſtated. It has been doubted whether at common law larceny can be committed of fiſh in a pond. It is admitted that it may be if they be confined in a trunk or net; becauſe they are then reſtrained of their natural liberty. And it ſeems difficult not to extend the application of the ſame reaſon to the caſe of fiſh in a pond; the pond being private incloſed property, and the fiſh liable to be taken at any time according to the pleaſure of the owner. Lambert ſays, "fiſhes in ſtreams and rivers are nullius bona, et occupanti conceduntur: but he and others agree that it may be felony to take them in a trunk, ſtew, or pond: for a man hath ſuch a poſſeſſion of them, that by their reſtraint they cannot without help uſe their nature and forſake him." So by Lord Coke; Larceny may be committed of fiſh in a trunk or pond, becauſe they are not at their natural liberty, but as it were in a pound. The caſe of Grey and Bartholomew was a queſtion between the heir and executor, which of them ſhould have fiſh out of a pond. There it was adjudged that the heir was entitled to them, upon the ſame principle that he ſhould have deer in a park. Hawkins conſiders it as clear that the taking fiſh out of a pond is felony.

Lamb. 274. 18 E. 4. 8. pl. 7. 9 H. 6. 14. pl. 10. Staundf. 25. b. MS. Sum. 3 Inſt. 109.

Rex v. Hanſon and Graham, O. B. 1757. Grey v. Bartholomew, Owen, 20. Goldſb. 129. *Vide* 3 Mod. 97. 6 Mod. 183. Cro. Car. 553. 1 Lev. 203. 1 Hawk. ch. 33. ſ. 25.

The ſtat. 22 & 23 Car. 2. c. 25. was not calculated to remove the doubt. That ſtatute, reciting that whereas divers idle perſons do betake themſelves to ſtealing, taking, and killing of fiſh out of ponds, pools, motes, ſtews, and other ſeveral waters and rivers, to the great damage of the owners; enacts, "that if any perſon ſhall uſe any caſting net, &c. "or other net whatſoever, &c. or ſhall take fiſh by any "means or device whatſoever, in any river, ſtew, pond, "mote, or other water as aforeſaid; or ſhall be aiding or "aſſiſting thereunto, without the licence or conſent of the

22 & 23 Car. 2. c. 25. ſ. 7.

"lord

" lord or owner of the ſaid water; and be thereof convict, Ch. XVI. § 43. *Fiſh.*
" &c. before any juſtice, &c.; ſuch offender in ſtealing, tak-
" ing, or killing fiſh, ſhall for every ſuch offence give ſuch
" recompence as the juſtice, &c. ſhall appoint, not exceeding
" treble damages, and pay 10s. to the poor, &c."

In Rex v. Mallinſon Lord Mansfield ſaid that the offence provided againſt by this ſtatute of Car. 2. is *ſtealing fiſh*: taking and killing, in the intention of the act, means ſtealing. 1 Burr. 682.

But now by ſtat. 5 G. 3. c. 14. " If any perſon ſhall 5 G. 3. c. 14 ſ. 1.
" enter into any park or paddock fenced in or incloſed, or
" into any garden, orchard, or yard, adjoining or belong-
" ing to any dwelling-houſe, in or through which park, &c.
" or garden, &c. any river or ſtream of water ſhall run or
" be; or wherein ſhall be any river, ſtream, pond, pool,
" mote, ſtew, or other water; and by any means or device
" whatſoever ſhall ſteal, take, kill, or deſtroy any fiſh bred
" kept, or preſerved in any ſuch river, &c. without the con-
" ſent of the owner; or ſhall be aiding or aſſiſting therein
" as aforeſaid; or ſhall receive or buy any ſuch fiſh, know-
" ing the ſame to be ſo ſtolen or taken as aforeſaid; and being
" thereof indicted within ſix calendar months next after
" ſuch offence or offences ſhall have been committed, before
" any judge or juſtices of gaol delivery for the county
" wherein any ſuch park or paddock, garden, orchard, or
" yard ſhall be; and ſhall on ſuch indictment be by verdict
" or confeſſion convicted of ſuch offence, &c. the perſon
" or perſons ſo convicted ſhall be tranſported for 7 years."

By ſ. 2. an offender diſcovering and convicting an accomplice is entitled to a pardon.

And by ſ. 3. " If any perſon ſhall take, kill, or deſtroy,
" or attempt to take, kill, or deſtroy, any fiſh in any river or
" ſtream, pond, pool, or other water, (not being in any park
" or paddock, or in any garden, orchard, or yard adjoining,
" &c.) but in any other incloſed ground, private property;"
he ſhall, on ſummary conviction, forfeit 5 l. to the owner, &c.

An indictment againſt John Hundſon on the ſtat. 5 Geo. 3. c. 14. charged him with unlawfully entering a garden of A. T. adjoining and belonging to her dwelling-houſe, in which was a certain pond uſed for keeping fiſh, and without A. T.'s conſent, with a certain net ſtealing and taking out Hundſon's caſe, O. B. 1781, cor. Willes J. MS. Buller J. 2 MS Sum. 285, & MS. Crown Caſ. Reſ.

Ch. XVI. § 43. *Fish.*

of the ſaid pond a certain quantity of live gold and ſilver fiſh, *of the goods and chattels of the ſaid A. T.*, againſt the form of the ſtatute. On evidence it appeared that the pond out of which the fiſh were taken adjoined to the houſe, and was about twenty yards in length and ten in breadth; that gold fiſh and other fiſh were kept in it, which were uſually fiſhed for with a hook and line. It was objected, that fiſh in an open pond were feræ naturæ, unreclaimed, and not the property of any particular perſon, as they were laid to be in the indictment. In anſwer to which a diſtinction was taken on the part of the crown, that this was not an indictment for a felony, but only for a miſdemeanor on the ſtatute (*a*), though the puniſhment directed was tranſportation. In Eaſter term 1781 all the Judges held the indictment good, the caſe being fully brought within the ſtat. 5 Geo. 3. without the allegation that the fiſh were the goods and chattels of any perſon; and therefore that part of the indictment was ſurpluſage. But if the indictment had been at common law for felony, it was the opinion of ſome that it ſhould have deſcribed what ſort of a pond it was, that it might appear on the face of the indictment that taking fiſh out of ſuch a pond was felony.

§ 44. *Conies and hares.* 3 Jac. 1. c. 13.

In reſpect to conies, the ſtat. 3 Jac. 1. c. 13. enacts, "that if any perſon ſhall in the night-time or by day wrongfully or unlawfully break or enter into any park impaled, "or any other ſeveral grounds incloſed with wall, pale, or "hedge, and uſed or kept for the keeping, breeding, &c. of "any deer or conies; and wrongfully or unlawfully ſhall "hunt, drive, or chaſe out, or take or kill any deer or co-"nies within any ſuch impaled park, &c. againſt the will of "the owner or occupier, &c. of the ſame, not having lawful "authority, &c.; and thereof ſhall be convicted at the ſuit of "the king or the party grieved, he ſhall be impriſoned three "months, and pay to the party grieved treble damages and "coſts, &c. and find ſureties for good behaviour for ſeven "years, or continue in priſon till he does." But this extends not to any grounds to be incloſed and uſed for conies after the making of the act, without the king's licence. Nor by ſ. 8. to the hunting, chaſing, or killing any deer or conies in the *day-time*: which contradictory proviſion is noticed by

(*a*) It is obſervable, however, that the ſtatute uſes the word *ſteal*.

the

the ſtat. 7 Jac. 1. c. 13. and repealed as to deer, but preſerved as to conies. Ch. XVI. § 44. *Conies and hares.*

The ſtat. 22 & 23 Car. 2. c. 25. ſ. 4. enlarges the deſcription of the offence to warrens or grounds lawfully uſed or kept for the breeding or keeping of conies, although the ſame be not incloſed; and ſubjects the offender to puniſhment on ſummary conviction. 22 & 23 C. 2. c. 25. ſ. 4.

The ſtat. 5 Geo. 3. c. 14. enacts, "that if any perſon "ſhall wilfully and wrongfully in the night-time, enter into "any warren or grounds lawfully uſed or kept for the breed-"ing or keeping of conies, although the ſame be not in-"cloſed, and ſhall then and there wilfully and wrongfully "take or kill in the night-time any coney or conies againſt "the will of the owner or occupier thereof, or ſhall be aid-"ing or aſſiſting therein; and ſhall be convicted of the ſame "before juſtices of oyer and terminer or gaol delivery; "every ſuch offender ſo convicted, &c. ſhall and may be "tranſported for ſeven years, or ſuffer ſuch other leſſer pu-"niſhment by whipping, fine, or impriſonment, as the court "before whom ſuch perſon ſhall be tried ſhall award." Provided (ſ. 8.) that conies may be killed or taken, &c. in the day-time on the ſea or river banks in the county of Lincoln; ſo far as the tide ſhall extend, or within one furlong of the ſaid banks, &c.; and (by ſ. 9.) the perſon taking them ſhall not be obliged to make ſatisfaction for damage done by ſuch entry, unleſs the ſame ſhall exceed one ſhilling. The object of this exception was to prevent the deſtruction of the banks by the increaſe of conies. 5 G. 3. c. 14. ſ. 6. 8, 9.

By 9 Geo. 1. c. 22. "if any perſon being armed and diſ-"guiſed (as before ſtated) ſhall appear in any warren or "place where hares or conies are uſually kept, or unlaw-"fully rob any ſuch warren, &c. or (whether armed and "diſguiſed or not) ſhall reſcue any perſon in cuſtody for "ſuch offence, or procure any perſon to join him therein, "he ſhall be guilty of felony without benefit of clergy." 9 G. 1. c. 22. *Vide ante*, 603.

The general reſult of theſe ſtatutes appears to be, that by ſtat. 3 Jac. 1. c. 13. if a wrong-doer ſhall hunt, drive out, take, or kill, any coney in the night-time in any incloſed ground kept for that purpoſe, which was ſuch at the time Reſult.

Ch. XVI. § 44. *Conies and hares.*

of paſſing the act, or has become ſo ſince by the king's licence, he may be proſecuted for the miſdemeanor at the aſſizes or ſeſſions. By the ſtat. 22 & 23 Car. 2. c. 25. ſ. 4. if he chaſe, take, or kill any coney either by day or night in any ground uſed for keeping conies, whether incloſed or not, he is liable to be convicted before a magiſtrate. The ſtat. 5 Geo. 3. c. 14. gives juriſdiction to the juſtices of oyer and terminer and gaol delivery, where the offence of *taking* or *killing* any coney is committed in the night, in any ground uſually appropriated to the keeping of them, whether incloſed or not; and gives a diſcretionary power of tranſporting the offender. And if any ſuch place where hares or conies are kept be robbed at any time by any offender armed and diſguiſed, it is made felony without benefit of clergy by the ſtat. 9 Geo. 1. c. 22.

§ 45. *Animals of baſe nature.* 1 Hale, 512. 1 Hawk. ch. 33. ſ. 23. 3 Inſt. 109. 10 G. 3. c. 18.

But there are ſome animals which, though they may be reclaimed, yet are conſidered of ſo baſe a nature that no larceny can be committed of them; ſuch as bears, foxes, monkies, cats, ferrits, and the like. And the ſame rule applied to dogs; but now by ſtat. 10 Geo. 3. c. 18. the ſtealing of dogs is made puniſhable upon conviction before two juſtices.

§ 46. *Domeſtic animals.* 1 Hale, 511. 1 Hawk. ch. 33. ſ. 28.

Of domeſtic animals, ſuch as ſheep, oxen, horſes, and the like, or of domeſtic creatures which are fit for food, as hens, ducks, geeſe, turkeys, peacocks, &c.; and alſo of their eggs, larceny may be committed. Concerning ſome of theſe particular proviſion has been made by ſtatute.

§ 47. *Horſes.* 1 Ed. 6. c. 12. 2 MS. Sum. 283. 1 Hale, 531. 2 Hale, 365. R. v Pearles, Pott. ſ. 137.

By ſtat. 1 Ed. 6. c. 12. ſ. 10. it is enacted, "that no "perſon or perſons who ſhall be convicted of felonioufly "ſtealing any horſes, geldings, or mares; or being indicted "or appealed thereof, and thereupon found guilty by ver- "dict, or ſhall confeſs the ſame on arraignment, or will not "anſwer directly, or ſhall ſtand mute, ſhall have the benefit "of clergy." Therefore if the jury were to find the value to be 12d. or under, it would not be capital, becauſe the party in that caſe would have no occaſion to pray clergy. This ſtatute

ſtatute however mentioning thoſe animals in the plural number only, a doubt aroſe whether it extended to the caſe of ſtealing a ſingle horſe, &c.; to remove which the ſtat. 2 & 3 Ed. 6. c. 33. declares and enacts, "that all perſons feloniouſly taking or ſtealing any horſe, gelding, or mare, ſhall be put from their clergy in like manner and form as though they had been indicted or appealed for felonicus ſtealing two horſes, two geldings, or two mares of any other, and thereupon found guilty by verdict, or confeſs the ſame on their arraignment, or ſtand wilfully mute." Ch. XVI. § 47. *Horſes.* 2 & 3 Ed. 6. c. 33.

Though this ſtatute mentions thoſe offenders only who ſhall be convicted by verdict or confeſſion, or by ſtanding mute, or not directly anſwering; yet it ſeems a reaſonable conſtruction, according to Hawkins, to extend it to thoſe who ſhall be outlawed or challenge above 20: becauſe, ſays he, it is general; that all ſuch perſons ſhall be put from their clergy, &c. in ſuch manner as if they had been found guilty, &c.; and if they had been found guilty, it is certain they would have been ouſted of their clergy by the expreſs words of the ſtat. 1 Ed. 6. c. 12. ſ. 10. However the ſtat. 3 & 4 W. & M. c. 9. ſeems to extend to ouſt all ſuch offenders. 2 MS Sum. 283. 2 Hale, 365. 2 Hawk. ch. 33. ſ. 62. MS. ſupra.

The ſtat. 37 H. 8. c. 8. ſ. 2. was more particularly worded than either of the acts of Ed. 6. and mentioned "any horſe, gelding, mare, *foal*, or *filley*;" but this ſtatute is repealed by the general words of the ſtat. 1 Ed. 6. c. 12. except ſo far as it is therein re-enacted. And as the words "*foal* or "*filley*" are dropped in both the acts of Ed. 6. it has been queſtioned by ſome whether they extend to a foal or filley ſo as to ouſt clergy. But yet it ſeems that the words of thoſe acts are plain and general enough to include them; and it is refining rather too much to argue thoſe words into doubt from the over nicety of a prior ſtatute which is ſet aſide. 37 H. 8. c. 8. ſ. 2. 2 Hale, 364. 2 MS. Sum. 535.

The ſtatutes of Ed. 6. extend not to take away clergy from the acceſſaries before or after. But 1 Hale, 529.

By the ſtat. 31 Eliz. c. 12. ſ. 5. (which regulates the public ſale of horſes) it is enacted, "that not only all acceſſaries before ſuch felony, but alſo all acceſſaries after (i. e. in horſe-ſtealing) ſhall be deprived of clergy, as the principal, by ſtatute heretofore made, is or ought to be." 31 El. c. 12. ſ. 5. *Acceſſaries.*

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But it muſt be obſerved that this ſtat. extends only to ſuch perſons as were acceſſaries in judgment of law at the time the act was made, namely, acceſſaries at common law: and therefore in Eaſter term, 2 Ann. it was agreed by all the Judges not to extend to one who knowingly received a ſtolen horſe, though made an acceſſary after by the ſtat. 3 & 4 W. & M. c. 9.

MS. Tracy, 229. Foſt. 373. 2 MS. Sum. 535. Poſt. f. 141.

§ 48. *Sheep and other cattle.*

14 Geo. 2. c. 6.

By ſtat. 14 G. 2. c. 6. reciting "that ill-diſpoſed perſons "had made it a practice ſecretly in the night to kill ſheep "and ſtrip off their ſkins, and then ſteal the carcaſes, leaving the ſkins behind to prevent diſcoveries; and alſo in "like manner to kill ſheep, and then cut them open and "take out and ſteal their inward fat, leaving their carcaſes "behind to prevent being diſcovered," &c. enacts "that "if any perſon or perſons ſhall at any time feloniouſly drive "away, or in any other manner feloniouſly ſteal one or "more ſheep or other cattle of any other perſon or perſons "whatſoever; or ſhall wilfully kill one or more ſheep or "other cattle of any other perſon or perſons, with a felonious intent to ſteal the whole carcaſe or carcaſes, or any "part or parts of the carcaſe or carcaſes of any one or "more ſheep or other cattle which ſhall be ſo killed; or "ſhall aſſiſt or aid any perſon or perſons to commit ſuch "offence or offences; then the perſon or perſons guilty of "any ſuch offence, being thereof convicted, ſhall be adjudged guilty of felony without benefit of clergy."

15 Geo. 2. c. 34. *Other cattle.*

This ſtatute, with reſpect to the words "*other cattle*," is explained by ſtat. 15 G. 2. c. 34. which enacts and declares "that the former ſtatute was intended and ſhall be "deemed to extend to any bull, cow, ox, ſteer, bullock, "heifer, calf, and lamb, as well as ſheep, and to no other "cattle whatſoever."

Cook's caſe, Warwick Lent Aſſ. 1774. 2 MS. Sum. 284. (S. C. 1 Leach, 123.)

Serjeants' Inn, April 20, 1774.

Richard Cook was indicted for ſtealing a cow. It appeared in evidence that the beaſt was only two years and a half old, and had never had a calf; and that ſuch female of the cow kind, however old, if ſhe have never had a calf, is always called a heifer. The Judges were all of opinion, upon reference to them, that as the ſtatute particularly mentions cows and heifers, and the beaſt ſtolen was not

ſuch

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such as was described in the indictment, the prisoner was entitled to an acquittal.

Rawlins was indicted for stealing six lambs: and the fact proved was, that the carcases of the lambs, without their skins, were found on the premises where they had been kept, and that the prisoner had sold the skins, (which were identified,) the morning after the offence was committed. There was no count in the indictment for killing with intent to steal the carcase, or any part thereof; but as the lambs must have been removed from the fold, the jury were directed to find the prisoner guilty, which they accordingly did. But a doubt occurring whether as the statute 14 Geo. 2. c. 6. specifies feloniously driving away, and feloniously killing with intent to steal the whole or any part of the carcase, as well as feloniously stealing in general, although there must, in such cases, be some removal of the thing, it did not intend to make these different offences; the case was submitted to the Judges in Mich. term 1800, who all held the conviction right; for any removal of the thing feloniously taken constitutes larceny. Crompton's Justice states the law in the same manner.

Rawlins' case, Sarum, Sum. Ass. 1800, cor. Lord Eldon. MS. Jud. *Indictment for stealing lambs sustained by proof that the carcases were found in the owner's ground, and only the skins taken away.* *Vide* Sum. 64. S. P.

(Absent Lawrence J.)

Crompt. 36. pl. 17.

Cowell and Green were convicted upon an indictment charging that Cowell feloniously stole one live ewe sheep, the goods, &c. of J. L.; and that Green received "twenty pounds of *mutton*, part of the goods, &c. so as aforesaid feloniously stolen, &c. knowing the same to have been stolen." On a question referred to the Judges, whether the indictment were sufficient against the accessary, they all held the conviction proper.

Indictment against principal and receiver. R. v. Cowell and Green, Suffolk Sum. Ass. 1796, cor. Lord C. J. Eyre, MS. Buller J. and MS. Jud. Mich. T. 1796.

To prevent larcenies of cattle and horses certain regulations are made for slaughter-houses by the stat. 26 Geo. 3. c. 71.

§ 49. *Produce of such animals.*

It being felony to steal the animals themselves, it is also felony to steal the product of any of them, though taken from the living animals. Thus milking cows at pasture, and stealing the milk, was holden felony by all the Judges, on a case reserved by Serjt. Leigh, who sat for Bathurst J. on the Oxford circuit, about 1769.

Serjt. Forster's MS. 99. cites De Grey's MS.

So

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So pulling the wool from ſheep's backs is felony; it being underſtood in this, as in the other inſtance, that the fact is done fraudulently and felonioufly, and not merely from wantonneſs or frolic; which muſt be collected from concurrent circumſtances, ſuch as the quantity taken, the uſe to which it is applied, the behaviour of the party, &c.

Martin's caſe, Northampton Lent Aſſ. and Eaſt. term, 1777, MS. Crown Caſ. Reſ. (S. C. 1 Leach, 205).

§ 50. *Plate glaſs manufactory.* 13 Geo. 3. c. 38. ſ. 29. continued by 38 Geo. 3. c. 17. ſ. 24.

By the ſtat. 13 Geo. 3. c. 38. for incorporating the Britiſh Plate Glaſs Manufactory, it is enacted (ſ. 29.) "That if "any perſon or perſons ſhall by day or night break into "any houſe, ſhop, cellar, vault, or other place or building, "or by force enter into any houſe, &c. belonging to the "ſaid manufactory, or wherein the ſame ſhall be then carrying on, with intent to ſteal, cut, break, or otherwiſe "deſtroy any glaſs, or plate glaſs, wrought or unwrought, "or any materials, tools, or implements, uſed in, for, or "about the making thereof, or any goods and wares be"longing to the ſaid manufactory; or ſhall ſteal or wilfully "or maliciouſly cut, break, or otherwiſe deſtroy, any ſuch "glaſs, materials, tools, or implements; every ſuch of"fender, being thereof lawfully convicted, ſhall be ad"judged guilty of felony, and ſhall be tranſported for a "term not exceeding ſeven years." But the ſtat. 38. Geo. 3. c. 17. (local and private acts) ſ. 24. enables the court before whom any ſuch offender is tried, to adjudge him "to ſuffer "ſuch leſs puniſhment as the court ſhall think fit to award."

§ 51. *Woollen cloth.* 22 Car. 2. c. 5.

By ſtat. 22 Car. 2. c. 5. ſ. 3. "No perſon who ſhall be "indicted for felonioufly cutting and taking, ſtealing or "carrying away of any cloth or woollen manufactures from "the rack or tenters (*a*) in the night time, and be thereupon "found guilty by verdict, or ſhall confeſs the ſame on ar"raignment, or will not anſwer to the ſame directly, or "ſhall ſtand mute, or challenge peremptorily above twenty, or "ſhall be upon ſuch indictment outlawed, ſhall be admitted "to the benefit of clergy." But (by ſ. 4.) the court before whom ſuch offender ſhall be arraigned and condemned, may

(*a*) Where, as appears by the preamble, the ſaid cloth is put for the drying thereof.

grant

grant a reprieve for the ſtaying execution, and cauſe him to be tranſported for ſeven years, "to be accounted from the "time of ſuch tranſportation. And if ſuch offender refuſe "to be ſo tranſported, or after ſuch tranſportation ſhall re- "turn into England, Wales, or Berwick upon Tweed, he "ſhall be put to execution upon the judgment ſo given "againſt him." Ch. XVI. § 51. *Woollens.*

This ſtatute extends not to acceſſaries. 2 Hawk. ch. 33 ſ. 70.

By ſtat. 15 Geo. 2. c. 27. ſ. 1. "If any cloth or woollen "goods on the rack or tenters, or woollen yarn, or wool "left out to dry, ſhall be ſtolen in the night, any juſtice of "peace, upon complaint made within ten days by the owner, "may iſſue his warrant to any peace officer, in the day- "time to enter into and ſearch, the houſe, out-houſe, yards, "gardens, or other places, belonging to the houſes of every "perſon whom ſuch owner ſhall upon his oath declare to "ſuch juſtice he ſuſpects to have ſtolen, taken away, or "received the ſame. And if the officer ſhall find any ſuch "goods, which from the oath of ſuch perſon he ſhall have "reaſon to ſuſpect to have been ſo ſtolen, he ſhall appre- "hend every perſon in whoſe cuſtody or poſſeſſion the ſame "ſhall be found, and carry him before a juſtice: and if "ſuch perſon arreſted ſhall not give a ſatisfactory account "how he came by the ſame, or in a convenient time to be "ſet by the juſtice produce the party of whom he had the "ſame, or a credible witneſs to depoſe on oath his property "therein, or right of poſſeſſion; he ſhall be convicted of "ſtealing ſuch goods; and for the firſt offence forfeit treble "the value, &c. or be impriſoned, &c. For the ſecond "offence ſhall both incur forfeiture and ſuffer impriſonment. "And if ſuch perſon ſhall again commit the ſame offence, "and be thereof convicted, as aforeſaid, the juſtice or "juſtices of the peace before whom ſuch perſon ſhall be ſo "convicted as aforeſaid ſhall forthwith iſſue his or their "warrant to commit the ſaid offender to the common gaol, "there to remain till the next aſſizes or great ſeſſions, "where he ſhall be tried for the ſaid offence. And in caſe "he ſhall not, by producing the party of whom he acquired "the property or poſſeſſion of ſuch goods, or otherwiſe, "prove to the ſatisfaction of the jury, that he lawfully ob- "tained 2 Hawk. ch. 33 ſ. 70. 15 G. 2. c. 27.

Ch. XVI. § 51. *Woollens.*

"tained the property or poſſeſſion of the ſame, he ſhall be "adjudged guilty of felony, and be tranſported for ſeven "years: and ſhall be liable to the ſame puniſhment, and to "the like methods of proſecution, trial, and conviction, for "returning from ſuch tranſportation, as other felons are "liable to by virtue of the laws now in force." But (by ſ. 3.) "This ſhall not alter any former law in force for "ſtealing or receiving ſuch cloth, woollen yarn, or wool, "except where the proof is laid on the offender as afore-"ſaid."

§ 52. *Linen, cotton. &c.* 18 G. 2. c. 27. repealing ſtat. 4 G. 2. c. 16.

By ſtat. 18 Geo. 2. c. 27. ſ. 1. "Every perſon who ſhall "by day or night feloniouſly ſteal any linen, fuſtian, callico, "cotton cloth, or cloth worked, woven, or made of any "cotton or linen-yarn mixed, or any thread, linen, or cot-"ton-yarn, linen or cotton-tape, incle, filletting, laces, or "any other linen, fuſtian, or cotton goods or wares what-"ſoever, laid, placed, or expoſed, to be printed, whitened, "bowked, bleached, or dried, in any whitening or bleach-"ing-croft, lands, fields, or grounds, bowking-houſe, dry-"ing-houſe, printing-houſe, or other building, ground, or "place, made uſe of by any callico printer, whiſter, crofter, "bowker, or bleacher, for printing, whitening, bowking, "bleaching, or drying of the ſame, to the value of 10 s.; "or who ſhall aid or aſſiſt, or ſhall wilfully or maliciouſly "hire or procure any other perſon or perſons to commit "any ſuch offence; or who ſhall buy or receive any ſuch "goods or wares ſo ſtolen, knowing the ſame to be ſtolen "as aforeſaid, ſhall on conviction be deemed guilty of fe-"lony without benefit of clergy." But by ſ. 2. the court may inſtead of giving judgment of death, order ſuch of-fender to be tranſported for fourteen years.

Breaking gaol or returning from tranſportation before the end of the term is (by ſ. 3.) felony without clergy.

4 G. 3. c. 37. ſ. 16. *vide* tit. Malicious Miſchief.

Alſo the ſtat. 4 Geo. 3. c. 37. ſ. 16. provides againſt the breaking into any houſe, ſhop, &c. or other place or building, with intent to ſteal, cut, or deſtroy any linen, yarn, or cloth, &c. by making it felony without benefit of clergy.

By

By ſtat. 31 Eliz. c. 4. ſ. 1. "If any perſon having the charge or cuſtody of any armour, ordnance, munition, ſhot, powder, or habiliments of war of the queen, &c. or of any victuals provided for any ſoldiers, gunners, mariners, or pioneers, ſhall for any lucre or gain, or wittingly, adviſedly, and of purpoſe to hinder or impeach her majeſty's ſervice, embezzle, purloin, or convey away the ſame, to the value of 20 s. at one or ſeveral times; ſuch offence ſhall be adjudged felony," &c. By ſ. 2. the proſecution muſt be commenced within a year after the offence done. Ch. XVI. § 53. *Naval and military ſtores, &c.* § 53. *Naval Stores, &c.* 31 Eliz. c. 4.

Habiliments extend to harneſs and all utenſils that belong to war. 3 Inſt. 79.

The ſtat. 22 Car. 2. c. 5. reciting the firſt clauſe of the above mentioned act, and that the offenders were emboldened by being admitted to clergy, enacts, ſ. 3. "that no perſon who ſhall be indicted for any offence againſt the ſaid recited act of the 31 Eliz.; or" (which extends to any perſon who) "ſhall felonioufly ſteal or embezzle any of his majeſty's ſails, cordage, or other of his majeſty's naval ſtores, to the value of 20 s., and be thereupon found guilty by verdict, or confeſs the ſame upon arraignment, or not anſwer directly, or ſtand mute, or challenge peremptorily above 20, or be outlawed upon ſuch indictment, ſhall be admitted to the benefit of clergy," &c. But the court may (by ſ. 4.) grant a reprieve for the ſtaying of execution, and cauſe the offender to be tranſported for ſeven years, to be accounted from the time of ſuch tranſportation, and there kept to hard labour. "And if any ſuch offender ſhall refuſe to be ſo tranſported, or after ſuch tranſportation ſhall return into England, Wales, or Berwick upon Tweed, within the time aforeſaid, he ſhall be put to execution on the judgment ſo given againſt him." 22 Car. 2. c. 5.

The act extends not to acceſſaries or appeals. It is recogniſed as an exiſting law in ſubſequent ſtatutes on the ſame ſubject, which create ſeveral new offences. 2 Hawk. ch. 33. ſ. 26.

This act of Car. 2. makes the embezzling of the king's naval ſtores to the amount of 20 s. felony, and takes away clergy Kent, Sum. Aſſ. 1749, per Burnet J. MS. Tracy, 120.

Ch. XVI. § 53. *Naval and military ſtores, &c.*

clergy from that, and alſo from the offence of ſtealing ſuch ſtores to the ſame amount, which was felony before.

Vide ante, f. 14. &c. Larceny by ſervants.

But further, though the ſtatute ſpeaks only of embezzling or ſtealing ſtores to the value of 20 s. ſtill it ſeems that any of the officers who have a bare charge of taking care of the ſtores in the king's warehouſes, or a mere authority to order them to be delivered out to the ſeveral workmen or others properly authorized to receive them, may be guilty of felony at common law in ſtealing them, to any amount, from ſuch places of depoſit. Accordingly, in Thorne's caſe, where it appeared that the priſoner was foreman of one of the ſtore-houſes in Plymouth dock, containing naval ſtores, and had given ſecurity in 200 l. for the faithful diſcharge of his duty, and was entruſted with the receiving and delivering out again of the ſtores in the abſence of the clerk, whoſe proper duty it was, when preſent: and that certain kerſey, for ſtealing of which he was indicted, was cut off by him from a bale in the ſtores, and delivered by him to an accomplice, to be taken out of the yard; though the value were under 20 s. he was convicted of larceny at common law by the direction of the court.

Thorne's caſe, Exeter Sp. Aſſ. 1800, cor. Palmer Serjt.

For other offences relative to the ſtealing, receiving, or having in poſſeſſion ſtores of this deſcription, I refer to the head of Receivers, after mentioned.

Poſt. f. 148. &c.

In regard to the particular goods, the ſtealing of which by ſervants is puniſhable under the ſtat. 21 H. 8. c. 7. or by lodgers, within the ſtat. 3 & 4 W. & M. c. 9. they have been already conſidered in treating of larcenies by thoſe reſpective deſcriptions of perſons; thoſe acts being levelled more at the perſons by whom ſuch offences are committed, than meant for the protection of the particular ſpecies of property in general.

Ante, f. 10. 26.

§ 54. *5. As to the Place where the Offence is committed.*

From what place. Ante, 588. 618.

In treating under the laſt head of the ſeveral ſpecies of property which the legiſlature have thought it neceſſary to protect from depredation by a peculiar ſanction, ſeveral kinds are to be noted to which ſuch ſanction only extends when taken from particular places.

They

Ch. XVI. § 54. *In houſes, &c.*

They were however conſidered under the former view of the ſubject; becauſe it was not ſo much the reſpective places which were intended to be ſo ſecured, as the ſeveral enumerated chattels uſually kept there. But under the preſent head of inquiry I ſhall be led to conſider ſuch ſtatutes as have been paſſed, more for the purpoſe of ſecuring particular places from being plundered, than of ſecuring any ſpecific property preſerved therein: although attention muſt ſtill be paid in ſome inſtances, which will be pointed out, to the general nature of the property taken.

§ 55. *Larceny from the houſe, &c.* 2 MS. Sum. 272. 528. 4 Blac. Com. 239, 240, 1. *Vide* Noah Pearce's caſe, ante, ſ. 39.

Larceny from the houſe is not diſtinguiſhed at common law from ſimple larceny, unleſs where it is accompanied with the circumſtance of breaking the houſe at night, when it falls under another deſcription, that of burglary. This offence, it ſeems, may, as in other caſes, be effected, as well where a delivery of the thing out of the houſe is obtained by any artifice from any perſon therein at the time, as where the thief himſelf enters the houſe and takes it there. In robbery and burglary the value is immaterial, however ſmall it be; for thoſe were capital offences before the ſtatute allowing clergy; and under different ſtatutes clergy is ouſted generally in thoſe two caſes. But in all other caſes of larceny committed in a dwelling-houſe, where clergy is taken away, the value muſt exceed *a ſhilling*, or it is not a capital offence. And now by various acts of parliament the benefit of clergy is taken away from larcenies committed in a houſe in almoſt every inſtance. And though the multiplicity of thoſe proviſions is apt to create ſome confuſion, yet upon comparing them, we may collect that the benefit of clergy is denied upon the following domeſtic aggravations of larceny:

Vide ſt. 25 Ed 3. ſt. 3. c. 4.

Firſt—In Larcenies above the Value of 12 *d. committed.*

§ 56. *Clergy.* 23 H. 8. c. 1. ſ. 3. 1 Ed. 6. c. 12. ſ. 10. 5 & 6 Ed. 6. c. 9. ſ. 5. 1 Hale, 522. Poſt. ſ. 74.

1. In a church or chapel, with or without violence or breaking the ſame.
2. In a booth or tent in a fair or market, in the day or night, by violence or breaking the ſame, the owner or ſome of his family being therein; though they need not be put in fear.

Ch. XVI. § 56. *In houses, &c.*

3. By robbing a dwelling-house in the day-time; (which robbing implies a breaking;) any person being therein, though not put in fear.

3 & 4 W. & M. c. 9.

4. In a dwelling-house, by day or night, without breaking the same, any person being therein and put in fear; which amounts in law to a robbery (*a*): and in both these last instances accessaries before the fact are excluded clergy.

2 MS. Sum. 272. 528. Post. f. 72. 3 & 4 W. & M. ch. 9. Post. f. 69.

Secondly—In Larcenies to the Value of 5 s. committed.

1. By breaking any dwelling-house, or any out-house, shop, or warehouse, thereto belonging, in the day time; though no person be therein: which extends to aiders, abettors, and accessaries before the fact.

39 Eliz. c. 15. 3 & 4 W. & M. c. 9. Sed. vi. Post. f. 76.

2. By privately stealing goods, wares, or merchandizes in any shop, warehouse, coach-house, or stable, by day or night; though the same be not broken open; and though no person be therein: which extends likewise to such as assist, hire, or command the offence to be committed.

10 & 11 W. 3. c. 23.

Thirdly—In Larcenies to the Value of 40 s.

In a dwelling-house or its out-houses, though not broken open, and whether any person be therein or not; unless committed by apprentices under the age of 15, against their masters: this also extends to aiders and assisters.

12 Ann. st. 1. c. 7.

§ 57. *The statutes.*

Keeping this index to the statutes in view, as far as respects the value of the goods stolen; the subject will be best illustrated by a recital of the statutes themselves in order of time, and a subsequent reference to them under the several heads of offences into which they branch; together with the cases which have been adjudged upon the construction of each. I begin with the stat. 23 H. 8. though it is much to be doubted whether it be not repealed as to the point of clergy, by stat. 1 Ed. 6. c. 12. which supplies its place in great measure; and if so, not revived by stat. 5 & 6 Ed. 6. c. 10.

23 H. 8. c. 1. s. 3. Post. f. 68.

By stat. 23 H. 8. c. 1. s. 3. "No person who shall be "found guilty after the laws of this land, for robbing any "churches, chapels, or other holy places; or for robbing

(*a*) If the property be taken by violence or terror in the presence of the party, which alone amounts to robbery, properly so called, the value is immaterial. *Vide* post. f. 70.

"of

" of any perſon or perſons in their dwelling-houſes, or " dwelling-places; the owner or dweller in the ſame houſe, " his wife, his children, or ſervants, then being within, " and put in fear and dread by the ſame; or for robbing of " any perſon or perſons in or near about the highways: nor " any perſon or perſons being found guilty of any abetment, " procurement, helping, maintaining, or counſelling of or " to any ſuch felonies, ſhall be admitted to his clergy; ſuch " as be within holy orders only excepted." Ch. XVI. § 57. *In houſes, &c.* *Statutes.*

By ſtat. 25 H. 8. c. 3. ſ. 2. " Every perſon indicted of " robbery, burglary, or other felony, according to the tenor " and meaning of the ſtat. 23 H. 8. and thereupon arraigned, " do ſtand mute, or challenge peremptorily above 20, or not " anſwer directly to the ſame indictment and felony where- " upon he is ſo arraigned, ſhall loſe the benefit of his clergy, " in like manner and form as if he had directly pleaded to " the ſaid robbery, burglary, or felony, whereupon he is ſo " arraigned, and thereupon had been found guilty, after " the laws of the land." 25 H. 8. c. 3. ſ. 2.

§ 58.

By ſtat. 1 Ed. 6. c. 12. ſ. 10. " No perſon who ſhall be " in due form of law attainted or convicted of breaking of " any houſe by day or by night; any perſon being then in " the ſame houſe, where the ſame breaking ſhall be com- " mitted, and thereby put in fear or dread; or of robbing " any perſon in or near the highway; or of felonioufly " taking of any goods out of any pariſh church or chapel; " or being indicted or appealed of any of the ſame offences, " and thereupon found guilty by verdict, or ſhall confeſs " the ſame upon his arraignment, or will not anſwer directly, " or ſhall ſtand mute, ſhall (not) be admitted to the benefit " of his clergy. And in all other caſes of felony, other " than ſuch as are before mentioned, &c. all perſons who " ſhall be arraigned or found guilty upon their arraignment, " or ſhall confeſs, or ſtand mute, in form aforeſaid, ſhall " have their clergy in like manner as before the 1 H. 8." This ſtatute muſt be intended of ſuch a houſe breaking as amounts to or is attended with felony. 1 *Ed.* 6. *c.* 12. ſ. 10. Poſt. ſ. 68.

§ 59.

The ſtat. 5 & 6 Ed. 6. c. 10. ſ. 1. &c. reciting the above-mentioned clauſe of the ſtat. 23 H. 8. concerning clergy, and 5 & 6 Ed. 6. c. 10.

Ch. XVI. § 59. *In houſes, &c.*

Statutes.

and taking notice that it was defective in omitting thoſe who rob, &c. in one county, and remove the thing taken into another, and were there tried, &c. and that this omiſſion was ſupplied by the ſtat. 25 H. 8. which latter ſtat. was made ineffectual in this reſpect, by the ſtat. 1 Ed. 6. c. 12. which reſtored clergy as it ſtood before the reign of Hen. 8th to all the felonies not therein mentioned; and that by reaſon of the ſaid ſtat. of Ed. 6. many perſons committing robbery or burglary in one county, and flying into another, and there taken with the mainour, and convicted of larceny, had been admitted to their clergy, to the great emboldening and comforting of ſuch offenders; for redreſs whereof enacts, "that "the ſtat. 25 H. 8. touching the putting of ſuch offenders "from their clergy, and every article, clauſe, and ſentence "contained in the ſame, touching clergy, ſhall touching ſuch "offence from henceforth to be committed and done, ſtand, "remain, and be in full force and virtue, in ſuch manner "and form as it did before the making of the ſaid act of "1 Ed. 6."

§ 60. 5 & 6 Ed. 6. c. 9.

The ſtat. 5 & 6 Ed. 6. c. 9. ſ. 1 & 2. reciting the ſtat. of the 23 H. 8. c. 1. which was made perpetual by the ſtat. 32 H. 8. c. 3. and that it had been doubted whether if ſuch robberies and felonies have been committed in dwelling-houſes, &c. the "owner or dweller in the ſame, his wife, "children, or ſervants, being then put in fear or dread by "the ſame, the offender ſhould loſe his clergy, unleſs the "ſame robbery or felony be committed in the very chamber, "houſe, or place, where the owner or dweller in the ſame "houſe, his wife, &c. ſhall happen to be or lie at the "time of ſuch robbery or felony committed, and put in "fear or dread; although the owner and dweller in ſuch "houſe, &c. his wife, &c. at the time of ſuch robbery "and felony committed, were or lay in other places within "the precinct of the ſame dwelling-houſes, nigh unto the "houſe or place where ſuch robbery and felony ſhall happen "to be done. Or if it happen, that the owner or dweller "within the ſame houſe, where ſuch robbery and felony "ſhall be done, his wife, &c. to be aſleep at the time of "ſuch robbery and felony, although the ſame robbery were "done

" done in the chamber or place where the owner or dweller " in the ſame houſe, his wife, &c. then lay; the offenders " being found guilty thereof ſhould loſe their clergy. And " reciting (ſ. 3.) further, that it had been doubted whether " if ſuch robberies and felonies be committed in any booth " or tent in any fair or market, the owner of the ſame, his " wife, &c. being within the ſame at the time of the com- " mitting of ſuch felonies, and put in fear and dread, the " offenders therein, being found guilty, ſhould not loſe their " clergy." (S. 4.) " For the true declaration and expla- " nation of the ſame doubts before recited, enacts, ordains, " and eſtabliſhes, that if any perſon or perſons be found " guilty of robbing of any perſon or perſons in any part or " parcel of their dwelling-houſes or dwelling-places, the " owner or dweller in the ſame houſe, or his wife, his " children, or ſervants, being then within the ſame houſe " or place, where it ſhall happen the ſame robbery and " felony ſhall be committed and done, or in any other " place within the precinct of the ſame houſe or dwelling- " place; that ſuch offenders ſhall not be admitted to their " clergy; whether the owner or dweller in the ſame houſe, " his wife, or children, then and there being, ſhall be " waking or ſleeping." " And (ſ. 5.) that no perſon or " perſons which ſhall be found guilty of and for robbing " any perſon or perſons in any booth or tent in any fair or " market, the owner, his wife, his children, or ſervants, " or ſervant, then being within the ſame booth or tent, " ſhall (not) be admitted to the benefit of clergy, &c. whe- " ther the owner or dweller of ſuch booths or tents, his " wife, children, or ſervants being in the ſame at the time " of ſuch robberies and felonies committed, ſhall be ſleep- " ing or waking."

Ch. XVI. § 60. *In houſes, &c.*

Statutes.

§ 61.

The ſtat. 4 & 5 Ph. & M. c. 4. ſ. 1. enacts, " that every " perſon who ſhall maliciouſly hire, command, or counſel " any perſon or perſons to commit or do any robbery in any " dwelling-houſe or houſes, or in or near the highway in " the realm of England, or in any of the queen's dominions, " or to commit or do any robbery in any place within the " marches of England againſt Scotland; that then every ſuch

4 & 5 Ph. & M. c. 4.

Ch. XVI. § 61. *In houſes, &c.* — *Statutes.*

" offender being outlawed thereof, or being thereof arraigned " and found guilty by the order of the law, or being other- " wiſe lawfully attainted or convicted of the ſame offence; " or being arraigned thereof do ſtand mute, or challenge pe- " remptorily above 20, or will not anſwer directly to ſuch " offence, ſhall not have the benefit of clergy."

2 Hawk. ch. 33. ſ. 46. 11 Co. 37.

Though this ſtatute be general as to all robberies in any dwelling-houſe, yet it is reſtrained in the conſtruction of it to ſuch robberies of this kind as are excluded from clergy by ſome former ſtatute.

§ 62. 39 Eliz. c. 15. poſt. ſ. 75.

The ſtat. 39 Eliz. c. 15. ſ. 1. reciting, " that then of " late divers felonious perſons underſtanding that the " robbing of houſes in the day-time, no perſon being therein " at the time, is not ſo penal as where ſome perſon is there- " in, had been emboldened to take their opportunity to " commit many heinous robberies in breaking and entering " divers houſes eſpecially of the poorer ſort, who are not " able to keep any ſervant, or otherwiſe to leave any perſon " to look to their houſe when they go to hear divine ſer- " vice, or from home to follow their labour," &c. enacts (ſ. 2.) " that if any perſon or perſons ſhall be found guilty " and convicted by verdict, confeſſion, or otherwiſe, ac- " cording to law, for the felonious taking away in the day- " time of any money, goods, or chattels, being of the value " of 5 s. or upwards, in any dwelling-houſe or houſes, or " any part thereof, or any outhouſe or outhouſes, belonging " to and uſed with any dwelling-houſe or houſes; although " no perſon ſhall be in the ſaid houſe or outhouſes at the " time of ſuch felony committed; then ſuch perſon ſhall " not be admitted to clergy."

§ 63 3 & 4 W. & M. c. 9. ſ. 2.

The ſtat. 3 & 4 W. & M. c. 9. ſ. 2. enacts " that if any " perſon or perſons whatſoever be indicted of any offence, " for which by virtue of any former ſtatute he or they are " excluded clergy, if he or they had been thereof convicted " by verdict or confeſſion; if he or they ſtand mute, or will " not anſwer directly to the felony, or challenge peremptorily " above 20, &c. or ſhall be outlawed thereupon, ſhall not " be admitted to the benefit of clergy."

The

Ch. XVI. § 64. *In houſes, &c.*

The ſame ſtatute, ſ. 1. enacts "that all and every perſon or perſons who ſhall rob any other perſon; or ſhall feloniouſly take away any goods or chattels, being in any dwelling-houſe, the owner or any other perſon being therein and put in fear; or ſhall rob any dwelling-houſe in the day-time, any perſon being therein; or ſhall comfort, aid, abet, aſſiſt, counſel, hire, or command, any perſon or perſons to commit any of the ſaid offences; or to break any dwelling-houſe, ſhop, or warehouſe, thereunto belonging, or therewith uſed, in the day-time, and feloniouſly take away any money, goods, or chattel, of the value of 5 s. or upwards, therein being; although no perſon ſhall be within ſuch dwelling-houſe, ſhop, or warehouſe; being thereof convicted or attainted, or being indicted thereof, ſhall ſtand mute, or will not directly anſwer to the indictment, or ſhall peremptorily challenge above 20, ſhall not have the benefit of clergy."

Statutes.
§ 64.
3 & 4 W. & M. c. 9. ſ. 1.

By ſtat. 10 & 11 W. 3. c. 23. "All and every perſon and perſons who, by night or day, ſhall in any ſhop, warehouſe, coach-houſe, or ſtable, privately and feloniouſly ſteal any goods, wares, or merchandizes, being of the value of 5 s. or more; though ſuch ſhop, &c. be not actually broken open by ſuch offender or offenders; and though the owners of ſuch goods, or any other perſon, be not in ſuch ſhop, &c. to be put in fear; or ſhall aſſiſt, hire, or command any perſon to commit ſuch offence; being thereof convicted or attainted by verdict or confeſſion, or being indicted thereof, ſhall ſtand mute, or not directly anſwer, or challenge peremptorily above 20, &c. ſhall be excluded clergy."

§ 65.
10 & 11 W. 3. c. 23.

The ſtat. 12 Ann. ſt. 1. c. 7. reciting that "foraſmuch as divers wicked and ill-diſpoſed ſervants and other perſons are encouraged to commit robberies in houſes by the privilege of clergy," &c. enacts "that every perſon who ſhall feloniouſly ſteal any money, goods, or chattels, wares or merchandizes, of the value of 40 s. or more, being in a dwelling-houſe, or outhouſe thereunto belonging;

§ 66.
12 Ann ſt. 1. c. 7. ſ. 1.

Ch. XVI. § 66. *In houſes, &c.*

Statutes.

" ing; although ſuch houſe or outhouſe be not actually " broken by ſuch offender; and although the owner of ſuch " goods, or any other perſon or perſons, be or be not in " ſuch houſe or outhouſe; or ſhall aſſiſt or aid any perſon or " perſons to commit any ſuch offence; being thereof con- " victed or attainted by verdict or confeſſion, or being in- " dicted thereof ſhall ſtand mute, or will not directly anſwer " to the indictment, or ſhall peremptorily challenge above " 20, &c. ſhall be debarred of clergy." With a proviſo, (ſ. 2.) " that the act ſhall not extend to apprentices under " the age of 15 years, who ſhall rob their maſters as afore- " ſaid."

Out of the above-recited ſtatutes are to be collected eight different claſſes of offences, which I ſhall now proceed to conſider of ſeparately; noticing by the way, whatever peculiarities may occur in the ſeveral forms of indictment, and referring to the before-mentioned index reſpecting the value of the property taken.

Ante, 623, 4.

1. *Larceny or Robbery in a Church or Chapel.*

§ 67. *Robbery and larceny in a church or chapel.* 2 Hale, 333. vi 11 Co. 29. 1 Ed. 6. c. 12. ſ. 10. 2 Hawk. c. 33. ſ. 74. 3 & 4 W. & M. c. 9. (2 Hale, 270.) 5 & 6 Ed. 6. c. 10. Sum. 241. Poſt. Trial, &c.

Clergy was it ſeems allowable at common law in caſe of ſacrilege, unleſs, as it is ſaid, the ordinary refuſed it. But now all perſons in general are ouſted of clergy for " the " felonioufly taking of any goods out of any pariſh church, " or other church or chapel," by ſtat. 1 Ed. 6. c. 12. ſ. 10. in all caſes, except that of challenging peremptorily more than 20, which is ſupplied by ſtat. 3 & 4 W. & M. c. 9. as to indictments (and is the leſs material, as ſuch challenges are now merely over-ruled); and this, as well in regard to indictments in another county, as in that in which the ſacrilege was committed, as will be ſhewn hereafter more at large.

2 Hawk c. 33. ſ. 75. 2 Hale, 365.

But acceſſaries before are not ouſted by any ſtatute now in force, ſince the repeal of the ſtat. 23 H. 8. c. 1. in that reſpect; unleſs the offence amount to burglary.

Ante, ſ. 32.

The ſtat. 4 Geo. 2. c. 32, againſt ſtealing lead or other fixtures there enumerated from buildings, has been holden to extend to churches.

2. *The breaking of Houſes by Day or Night, any Perſon being therein and thereby put in Dread.*

Ch. XVI. § 68. *In houſes, &c.*

§ 68. *Breaking houſes any perſon therein and put in fear.*

By the word "*breaking*" in the ſtat. 1 Ed. 6. c. 12. ſ. 10. muſt be underſtood ſuch a breaking as amounts to or is attended with ſome felony: and therefore if the houſe be broken in the day-time, though with a felonious intent, yet if nothing be taken, it is not within the ſtatute. Lord Hale, who once thought otherwiſe, afterwards corrected his opinion. So that the general words of it ought to be ſupplied with an intendment, viz. where the party is convicted of breaking the houſe in the night *burglariouſly*, or in the day, and *ſtealing goods therein*. But it requires an actual breaking of the houſe, ſuch as, if done in the night, would conſtitute burglary; and alſo a putting of ſome perſon within it in fear. Subject to this explanation, offenders of this deſcription above referred to (including aiders and abettors at the fact, though they do not enter the houſe,) are ouſted of clergy by ſtat. 1 Ed. 6. c. 12. ſ. 10. being all robbers; for otherwiſe, as Lord Hale obſerves, this great abſurdity would follow, that thoſe who are preſent, aiding, and aſſiſting in the robbery, would have a greater privilege than if abſent and only acceſſaries before, who are ouſted by the ſtat. of Ph. & M. aftermentioned. Such offenders are ouſted on being attainted or convicted, or upon indictment or appeal found guilty by verdict, or confeſſing the ſame upon arraignment, or not anſwering directly, or being wilfully mute; and by ſtat. 3 & 4 W. & M. c. 9. ſ. 2. upon indictment challenging peremptorily more than 20. The ſtat. 4 & 5 Ph. & M. c. 4. alſo includes acceſſaries before under all circumſtances, and extends as well to appeals as to indictments. And if the reaſoning of Lord Hale and Mr. J. Foſter upon Powlter's caſe be right, that the ſtat. of 4 & 5 Ph. & M., taking away clergy in all caſes from the acceſſary before, does by neceſſary conſequence take away clergy in all caſes from the principal; then it will follow of courſe, that the ſtatute having taken away clergy from the acceſſary before, in the caſe of his challenging above 20, upon an appeal, as well as upon an indictment, does alſo take it away in the ſame inſtance from the principal.

1 Ed. 6. c 12.
2 Hawk. ch. 33. ſ. 20
2 MS. Sum. 274.
1 Hale, 548.
562, 3.
2 Hale, 353.
11 Co. 31. b. 32. 36.
Poſt. ſ. 72.
1 Hale, 563.
2 Hale, 359.
3 & 4 W. & M. c. 9 ſ. 2.
4 & 5 Ph. & M. c. 4.
2 Hawk. ch. 33. ſ. 45.
2 Hale, 346, 7.
Foſt. 330.
Poſt. ſ. 73.

Ch. XVI. § 68. *In houſes, &c.*

Though this obſervation is more important from its general tendency, than from the particular inſtance to which it is applied; ſince by the practice of modern times, ſuch challenges above the allowed number in caſes of felony are merely over-ruled, and conſidered as a nullity, by force of the ſtat. 22 H. 8. c. 14. It is further to be remarked, that this ſtat. of the 1 Ed. 6. c. 12. has ſuperceded the neceſſity of the ſtat. 25 H. 8. c. 3. ſ. 2. and the 23 H. 8. c. 1. ſ. 3. therein recited, as far as they relate to this matter; even ſuppoſing the clauſes concerning the ouſting of clergy in this caſe, which were repealed by the ſaid ſtat. of 1 Ed. 6. were revived by the ſtat. 5 & 6 Ed. 6. c. 10. an opinion maintained by Serjt. Hawkins, grounded on the report of Lord Coke, but which is ably controverted by Mr. J. Foſter, who cites the opinion of Lord Hale to the ſame effect. For the deſcription of the offence is narrower in the ſtat. 23 H. 8. c. 1. ſ. 3. than in the ſtat. 1 Ed. 6. c. 12. ſ. 10. being confined to caſes where "*the owner or dweller in the ſame houſe, his wife, children, or ſervants,*" are within and put in dread: whereas the latter ſtatute extends the deſcription to "*any perſon*" being in the houſe, &c. And indeed this very ſtat. of 1 Ed. 6. is in its turn in effect rendered uſeleſs by ſtat. 3 & 4 W. & M. c. 9. ſ. 1. as will be preſently ſhewn.

2 Hale, 270. 345. 4 Blac. Com. 354.

2 Hawk. ch. 33. ſ. 43. 11 Co. 33. Foſt. 330. &c. 2 Hale, 347.

Poſt. ſ. 72.

§ 69. *Putting in fear without a breaking.*

3. *The felonious taking of any Goods out of a Dwelling-houſe, the Owner or any other Perſon being therein and put in Fear, (which amounts in Law to a Robbery); though there be no breaking of the Houſe.*

Clergy is ouſted in this caſe by ſtat. 3 & 4 W. & M. c. 9. ſ. 1. from principals, aiders, and abettors, and from acceſſaries before, upon conviction or attainder, or being indicted and ſtanding mute, or not directly anſwering, or peremptorily challenging above 20. And the ſtat. 12 Geo. 3. c. 20. which directs that any perſon being arraigned on any indictment or appeal for felony, and ſtanding mute, or not directly anſwering, ſhall be convicted of the felony, ſupplies the deficiency in that caſe upon appeals. And I have before ſhewn, that the challenging above 20 ſignifies nothing as to the point of clergy, as the challenge is merely over-ruled.

2 MS. Sum. 176. 1 Hawk. ch. 33. ſ. 88. (*Vide* 1 Hale, 518.) 3 & 4 W. & M. c. 9. ſ. 1. *Vide* ſt. 23 H. 8. c. 1. ſ. 3. ante. 12 Geo. 3. c. 20.

Supra.

No

Ch. XVI. § 69. *In houſes, &c.*

No breaking is neceſſary under this branch of the ſtat. of William (*a*).

A chamber of an inn of court has been holden to be a dwelling-houſe within this act, which muſt doubtleſs be governed by the ſame rules as prevail in the caſe of burglary (*b*).

(*a*) 2 MS. Sum. 276 *Vide* 1 Hale, 518. 548. on the correſponding ſt. of 23 H. 8. c. 1.

(*b*) Evans and Finch, Cro Car. 473. Poſt. f. 72.

§ 70. *Value.*

There is one point of ſome difficulty. In the text of the manuſcript referred to it is ſaid (ſpeaking of this branch of the ſtat. of King William) that the value of the goods taken is immaterial: but a quære is put to this in the margin, "*unleſs the thing be taken in the preſence of the party.*" I preſume the quære is made on the ground, that unleſs the thing be taken in the preſence of the party, the offence does not amount to robbery; and therefore, unleſs the value were above 1 s. the offender need not pray the benefit of clergy. But the manuſcript in the place above referred to ſeems to conſider that the ſtatute was not meant to be confined to ſuch a putting in fear as amounts in law to a robbery from the perſon, namely, where the thing is taken in his preſence. And this appears further, from the reaſoning adopted upon another branch of the ſame ſtatute, immediately following the paſſage cited: where ſpeaking of robbing any dwelling-houſe, any perſon being within the ſame, (the offence mentioned in the next ſection) it ſays, "and "this ſeems a capital offence, whether that perſon be put "in fear or not. The legiſlature meant to guard againſt "danger as well as fear: and when thieves break into a "houſe, all perſons within it may be deemed to be in dan-"ger of perſonal violence from ſuch daring ruffians: in this "caſe the value of the goods taken ſeems equally immate-"rial." And again, the ſame manuſcript ſpeaking of a third offence under the ſtatute of William; namely, the breaking of any dwelling-houſe, ſhop, or warehouſe, and taking money or goods to the value of 5 s., though no perſon happen to be therein; ſays, "If no perſon be within "the houſe, and conſequently no perſonal terror or danger "to any life be mixed with the felony, there muſt not only "be a breaking of the houſe, but a taking of money or "goods to the value of 5 s." According to this reaſoning

2 MS. Sum. 275.

Ch. XVI. § 70. *In houses, &c.*

therefore the aggravation of the offence in the first-mentioned clause, which I am now treating of, consists in the actual fear created in some person in the house, from the knowledge of thieves being therein, although out of his presence, and therefore the value of the thing taken as much out of the question as in robbery properly so called. Lord Hale may be thought to have adopted the same opinion, (speaking of the stat. 5 & 6 Ed. 6.) which applies to the first mentioned branch of the stat. of William, though not as to the offence of breaking the house without putting in fear. For he puts the case; if a man break a house in the day-time, and steal goods only of the value of 12 d., the owner, his wife, or children being in the house, *and not put in fear* (*a*); this will be but petit larceny; notwithstanding the stat. of 5 & 6 Ed. 6. takes away clergy: for that stat. altered not the nature of the offence, but takes away clergy where clergy was allowed before, namely, where the offence was capital, as in case of grand larceny. Therefore he considers that the putting in fear would affect the question of clergy even when the value of the thing taken was not more than 12 d. Yet it seems the usual interpretation of the statute has been, and is so expressed to be in another part of the same manuscript before quoted, that as well upon the clause requiring a putting in fear, as upon that which implies a breaking, in order to oust any offender of clergy, the value taken must in either case exceed 1 s.; with the exception in the former instance pointed out in the quære, where the thing is taken in the presence of some person in the house, so as to amount in law to a robbery.

1 Hale, 531.

Ante, f. 56.

Ante, 633.

§ 71. *Fear.*

But I do not find it any where settled, whether or not it be necessary to prove the actual sensation of fear felt by any person in the house; or whether if any person in the house be conscious of the fact at the time of the robbery, the fact itself raises the implication of fear from the reasonable grounds existing for it. Lord Coke (speaking of a similar provision in the stat. 1 Ed. 6. c. 12.) only says that if the party were in the house, and not put in fear, as, if he were asleep, or in another part of the house, the offender shall have his clergy. Yet in

3 Co. 37. b.

(*a*) Perhaps Lord Hale meant no more by these words, than virtually to except the case of *robbery*, properly so called.

these

Ch. XVI. § 71. *In houſes, &c.*

theſe caſes, there being no aſſault upon the perſon, as in conſtruction of law there is in every caſe of a robbery from the perſon, there does not ſeem the ſame reaſon for raiſing ſuch an implication. And I believe the practice is to require proof of an actual fear excited by the fact when committed out of the preſence of the party, ſo as not to amount to robbery at common law. But certainly if the perſon in whoſe preſence the thing was taken were not conſcious of the fact at the time, the caſe would not fall within the act.

Indictment. Rex v. Etherington, and Brook, on the ſpecial commiſſion at Lewes, May 1795, and before all the Judges in June 1795. MS. Jud. and MS. Buller J. (S. C. 2 Leach, 771.)

The indictment muſt allege that the perſons in the houſe were put in fear *by the priſoner;* merely ſtating the ſtealing of the goods in the dwelling-houſe of J. G. "he the ſaid "J. G. &c. then being in the ſaid dwelling-houſe, and "being put in fear therein, againſt the form of the ſtatute," &c. was holden by all the Judges (*abſente Groſe* J.) not to be ſufficient in the caſe of R. v. Etherington and Brook. On the firſt conſideration of the matter, moſt of the Judges inclined to think the indictment good in purſuing the words of the ſtatute. They all agreed that it was neceſſary to prove that the priſoners put the perſons in the dwelling-houſe in fear; and that ſuch was the meaning of the ſtatute: and they thought, that whatever was the conſtruction of the words of the ſtatute, the ſame muſt be the meaning and conſtruction of the ſame words in the indictment. But upon being referred to ſome precedents of indictments for burglary, in which to ouſt the offenders of their clergy in caſe of their ſtanding mute or challenging more than twenty, they were charged with putting perſons in fear who were in the houſes; (under which circumſtances they are ouſted of clergy by ſtat. 1 Ed. 6. c. 12.) and alſo to officium clerici pacis 149. 217. Weſt's Symbol. f. 234. 245. and 280. tit. Indictments and offences; and to a precedent of an indictment on the Weſtern circuit, found at the Summer aſſizes for Devon 1710, which charged that the priſoner Ann Anderſon domum manſionalem Joannæ Snell fregit et intravit, et præd. Joan. Snell in eadem domo exiſtent: in timore corporali vitæ ſuæ impoſuit, &c; they agreed that the priſoners were entitled to their clergy for the defect of the indictment in not ſtating that the perſons in the houſe were put in fear by the priſoners.

Vide 11 Co. 35. b.

4. *The*

Ch. XVI. § 72. *In houſes, &c.*

4. *The robbing of any Dwelling-houſe (which implies a breaking and an actual taking of the Goods) in the Day-time; any Perſon being therein, though not put in Fear.*

§ 72. *Breaking and ſtealing without putting in fear.* 2 Hale, 352, 3. 3 & 4 W. & M. c. 9. Ante, 632.

The ſtat. 3 & 4 W. & M. c. 9. ſ. 1. ouſts clergy in this caſe from the principals, aiders, and abettors, and acceſſaries before, upon conviction or attainder, or being indicted and ſtanding mute, or challenging peremptorily above 20. But what I have before obſerved concerning challenges will alſo apply here: and ſtanding mute operates as a conviction by ſtat. 12 Geo. 3. c. 20.

12 Geo. 3. c. 20.

Ante, 632. 2 MS. Sum. 272, 528. Ante, ſ. 58. 60. 1 Hale, 548. Kel. 68, 9. 2 Hawk. ch. 33. ſ. 40. Ante, ſ. 68.

This ſtat. of King William is more comprehenſive than either the ſtat. 1 Ed. 6. c. 12. or the ſtat. 5 & 6 Ed. 6. c. 9. ſ. 4. and ſeems to include them both as to this point. For as the word *robbing* here implies a *breaking*, and the ſtat. 1 Ed. 6. c. 12. ſ. 10. which ſpeaks only of a breaking, muſt be intended of ſuch an one as amounts to or is attended with felony; and they each require ſome perſon to be preſent in the houſe; they may in theſe reſpects be ſaid to amount to the ſame offence. But in the ſtatute of William, *the putting in fear* is omitted, which is neceſſary to bring the caſe within the ſtat. 1 Ed. 6. So with reſpect to the ſtat. 5 & 6 Ed. c. 9. which ouſts clergy in caſe of robbing any perſon in their dwelling-houſes, or dwelling-places; it agrees with the ſtat. of William in this, that a breaking of the houſe is neceſſary; for *robbing* implies violence: and it is not neceſſary that the perſons within ſhould be in fear; for the ſtatute extends to them "*whether waking or ſleeping:*" but it requires that the *owner* or *dweller in the houſe, his wife, children, or ſervants*, ſhould be in the ſame at the time of the robbery or felony; which has been holden not to extend to a ſojourner or lodger. Whereas the ſtatute of William is general as to "any perſon." But it is not neceſſary they ſhould be in the ſame room where the robbery is committed; nor need it be alleged in the indictment by way of robbery properly ſo called, viz. with violence from the perſon: but it is ſufficient to ouſt the offender of clergy to allege the breaking of the houſe and taking the goods there, ſuch an one being therein, &c.

2 Hawk. ch. 33. ſ. 92. 2 MS. Sum. 528. 1 Hale, 520. 522. 548. 2 Hale, 354.

2 Hawk. ch. 33. ſ. 93. 2 MS Sum. 527, 8. Dy. 183. b. (n) Kel. 69. 1 Hale, 522. 2 Hale, 354.

The breaking the door of an inner room, and ſtealing goods from thence, is within theſe ſtatutes; but not the breaking of a cheſt or fixed counter. It muſt be ſuch a robbery as would

1 Hale, 523. 526, 7, 8. 2 Hale, 355. 7, 8. MS. Burnet, 76. Kel. 59. 69. Foſt. 108, 9.

Ante, ſ. 69.

amount

amount to burglary if done in the night. And the same rule seems to prevail as to what shall be deemed a dwelling-house. Ch XVI. § 72. *In houses, &c.*

An indictment was laid upon the stat. 5 & 6 Ed. 6. for breaking the king's mansion at Whitehall, and stealing Sir H. Hungate's goods there, divers of the king's servants then being in the house. R. v. Williams and others, 14 Car. 1. 1 Hale, 522.

§ 73.

But the particular offence described in the stat. 5 & 6 Ed. 6. c. 9. is ousted of clergy in all cases, both as to principals and accessaries before, by force of that stat. and the express words of the stats. 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. s. 1, 2. and 12 G. 3. c. 20.; except as to the principal challenging above 20 on an appeal; to which according to Lord Hale and Mr. J. Foster, the stat. 4 & 5 Ph. & M. must be extended by necessary consequence, inasmuch as it ousts the accessary before in the same predicament: and upon the same ground, Lord Hale is clearly of opinion, that aiders and assisters within the stat. 5 & 6 Ed. 6. c. 9. are also ousted of clergy, though they do not actually enter the house. But he suggests whether it may not be necessary to charge them in the indictment, as "maliciously commanding, hiring, or "counselling" to the fact, within the words of the stat. 4 & 5 Ph. & M.; though he himself thinks the words, "ma- "liciously present, aiding, and abetting," include the former and much more; and he also thinks, that all may be indicted generally for the breaking, &c. as in case of burglary or robbery. 5 & 6 E. 6. c. 9. *Clergy.* 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. s. 1, 2. 12 Geo. 3. c. 20. 1 Hale, 528. Ante, s. 63. 1 Hale, 521, 2.

Whether or not the value of the thing taken be material in this offence of robbing an house, without putting any person therein in fear, has been discussed in a prior section: Lord Hale however is express that it must be above 12 d. in order to oust clergy. *Value.* Ante, s. 70. 1 Hale, 532.

5. *The robbing any Person in a Booth or Tent, in any Fair or Market, (which includes a Breaking) the Owner, his Wife, Children, or Servants being within the same, whether sleeping or waking.*

§ 74. *Breaking booth or tent, without putting in fear.*

This offence is only ousted of clergy in regard to principals, by stat. 5 & 6 Ed. 6. c. 9. s. 5. in case of being found guilty, (which means either by verdict or confession) upon an 1 Hale, 522. 2 Hale, 351. 2 Hawk. ch. 33. s. 91, 92. 2 MS. Sum. 528. 5 & 6 Ed. 6. c. 9.

Ch. XVI. § 74. *In booths or tents, &c.*

an appeal or indictment; which is extended by ſtat. 3 & 4 W. & M. c. 9. ſ. 2. (as to indictments,) to outlawry, ſtanding mute, or challenging above 20; and the ſtat. 12 G. 3. c. 20. includes ſtanding mute upon appeals. But it does not appear that acceſſaries before to a robbery in a booth or tent are ouſted of clergy by any ſtatute, unleſs it be a robbery from the perſon; in which caſe the ſtat. 3 & 4 W. & M. c. 9. attaches upon them: for the ſtat. 4 & 5 Ph. & M. extends only to dwelling-houſes.

3 & 4 W. & M. c. 9. ſ. 2.
12 Geo. 3. c. 20. *Acceſſaries.*
Vide 1 Hale, 564.

Ante, ſ. 61.

For the conſtruction put upon the ſtat. 5 & 6 Ed. 6. c. 9. I refer to the laſt ſection.

§ 75. *Breaking dwelling-houſes, out-houſes, ſhops, &c. though no perſon within, in the day-time, and ſtealing to the value of* 5 s.

6. *The Breaking of any Dwelling-houſe or Out-houſe, Shop, or Warehouſe, and the feloniouſly taking away Money, Goods, or Chattels of the Value of* 5 *s. or upwards in the Day-time; though no Perſon be within the ſame at the Time.*

39 Eliz. c. 15.
Ante, 628.
3 W. & M. c. 9. ſ. 2.

The principals are ouſted of clergy by ſtat. 39 Eliz. c. 15. upon being found guilty, and convicted by verdict, confeſſion, or otherwiſe; and the ſtat. 3 & 4 W. & M. c. 9. ſ. 2. extends it, as to indictments, to outlawry, as well as the other caſes there mentioned, and ſtanding mute, not directly anſwering, and challenging above 20 peremptorily; and the firſt ſection of the ſame ſtatute alſo ouſts the aiders and abettors, and acceſſaries before of their clergy, upon conviction or attainder, or being indicted and challenging peremptorily above 20, or ſtanding mute; which latter is ſupplied upon appeals as well as indictments, by ſtat. 12 G. 3. c. 20. in the manner before mentioned.

Ante, ſ. 69.

But ſeveral matters are neceſſary to be noted in the conſideration of the ſtat. 39 Eliz. and its auxiliary the ſtat. 3 & 4 W. & M.

Breaking.
R. v. Evans & Finch, 1 Hale, 527. Cro. Car. 474. 2 MS. Sum. 272. 273. 531. 2 Hawk. ch. 33. ſ. 96. 1 Hale, 525. 548. 2 Hale, 356. 2 MS. Sum. 277. 1 Hale, 526, 7. Ante, ſ. 72. 74.
(*a*) Smith's caſe, O. B. Oct. 1698.

Firſt, the neceſſity of a *breaking*, in order to bring the offence within the ſtat. 39 Eliz. is drawn principally from the preamble, which mentions *robbing* and *breaking and entering* houſes, &c.: for the words in the enacting clauſe are ſimply confined to *the felonious taking away of goods*, &c. and there muſt alſo be an actual breaking under this branch of the ſtat. of William. But ſuch a breaking as would conſtitute burglary if done in the night is ſufficient (*a*). Next, the words *breaking and entering* in the ſtat. of Eliz. are alſo in conſtruc-

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conſtruction connected with the felonious taking away in the enacting part; and therefore mere aiders or acceſſaries, who do not actually *enter* the houſe, are not within this ſtatute ſo as to be ouſted of clergy; though Hawkins doubts this being law in the caſe of aiders and abettors, upon general principles governing caſes of felony. But the conſtruction which has prevailed is founded on the particular wording of this ſtatute. And it is clear, that the ſtat. 4 & 5 Ph. & M. does not extend to this caſe.

Entering.
2 MS. Sum. 273.
Cro. Car. 474.
1 Hale, 526, 7.
564. n.
2 Hale, 358.
2 Hawk. ch. 33. ſ. 98.
Ante, ſ. 61.

Quære then, Whether a perſon preſent at the robbery and aſſiſting in it, but who does not enter the houſe, may be indicted as a principal, ſo as to be ouſted of clergy under either the ſtat. of Eliz. or that of W. & M.? or, whether he muſt be indicted as an aider and abettor under the latter act? Yet in the caſe of Mouncer and others, thoſe who watched without as well as he who entered were all indicted as principals, and, as it ſeems, ruled to be well enough; but the jury found the value under 5 s.

Aiders and abettors.

R. v. Mouncer and others, Eſſex, Lent Aſſ. 1792, cor. Hotham B. 2 Leach, 645.

The leaſt removal of the goods from the place where the thief found them, though they be not carried off out of the houſe, is within this act, as in other larcenies; for the ſtatute does not create a new felony, but only takes away clergy from the particular ſpecies of larceny deſcribed.

What a ſtealing.
2 MS Sum. 551.
1 Hale, 526.
Simſon's caſe, Cambridge, Lent Aſſ. 16 Car. 2.
Kel. 31.
2 Hale, 358.
Ante, ſ. 4.

§ 76.

Laſtly, the places deſcribed in the ſtat. 39 Eliz. are "*dwelling-houſe or houſes, or any part thereof; or any out-houſe* "*or out-houſes, belonging and uſed to and with any dwelling-*" *houſe or houſes.*" But the auxiliary ſtat. of William, which extends to aiders, abettors, and acceſſaries before, varies the terms to "*dwelling-houſe, ſhop or warehouſe thereunto* "*belonging, or therewith uſed,*" dropping the term *outhouſe*, uſed in the former ſtatute, and introducing the terms *ſhop* and *warehouſe*, which had not before occurred; though agreeing with the ſtat. of Eliz. in every other particular, as alſo in the turn of expreſſion. Yet ſome authorities, treating of theſe two ſtatutes, conſider them as co-extenſive and co-operating. But though a ſhop or warehouſe, belonging to and uſed with a dwelling-houſe, may, under moſt circumſtances, be ſuppoſed to fall under the deſcription of an out-houſe, if it be not part of the dwelling-houſe itſelf, yet the converſe

To what out-houſes extending. Vide 2 Hawk. ch. 33. ſ. 100.

4 Blac Com. 240.
2 MS. Sum. 272.

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converſe will not hold equally general. And therefore in the caſe of breaking any out-houſe, (not being part of the dwelling-houſe,) other than a ſhop or warehouſe, and ſtealing thereout under the circumſtances deſcribed in the ſtat. 39 Eliz. it does not appear that the acceſſary before is expreſsly ouſted by any ſtatute; and if not, neither is the aider or abettor, according to the conſtruction put upon that ſtatute, unleſs he actually enter the houſe. Though at any rate, if the value of the goods ſtolen amount to 40 s. then aiders and aſſiſters are ouſted of clergy by ſtat. 12 Ann. c. 7. But it will follow from the reaſoning upon Powlter's caſe before alluded to, that the ſtatute of William, having ouſted of his clergy the acceſſary before to ſuch a felony committed in a ſhop or warehouſe, muſt be taken to have ouſted the principal alſo under the like circumſtances. And the caſe of privately ſtealing in houſes is provided for by ſtat. 10 & 11 W. 3. c. 23. which I ſhall ſhortly deſcribe.

2 Hawk. ch. 33. ſ. 100, 101. Supra.

1 Hale, 565. n.

Ante, ſ. 68. 73.

§ 77. *Indictment.*

The indictment muſt preciſely purſue the words of the ſtatute 39 Eliz. By the words, "although no perſon ſhall be "in the ſaid houſe or out-houſes at the time of ſuch felony "committed," muſt be underſtood that no perſon was within at the time; and it muſt be ſo laid in the indictment and proved in evidence. And if it appear that the felony were committed in the night, ſo as to make it burglary; or when ſome of the family were in the houſe, in which caſe the offender might have been ouſted of clergy by the ſtat. 5 & 6 Ed. 6. c. 9. if the indictment had been framed on that ſtatute; the defendant can only be convicted of ſimple larceny, and ſhall not loſe the benefit of clergy.

1 Hale, 525. b.

§ 78. *Larceny of 5 s. in ſhop, &c. though not broken, and though no perſon within.* 10 & 11 W. 3. c. 23.

7. *Privately ſtealing Goods, Wares, and Merchandizes to the Value of 5 s. in a Shop, Warehouſe, Coach-houſe, or Stable, by Day or Night, though not broken, and though no Perſon be within at the Time.*

In theſe offences the ſtat. 10 & 11 W. 3. c. 23. excludes from clergy the principals, aſſiſters, hirers, and commanders; being thereof convicted or attainted by verdict or confeſſion, or being indicted and ſtanding mute, or challenging above twenty.

This

This ſtatute is defective in not mentioning perſons outlawed; nor, as Hawkins ſays, acceſſaries: but the latter aſſertion is too general as to acceſſaries before; for the ſtatute extends to ſuch as *hire* or *command* the offence to be committed. And Lord Coke, and after him Mr. Juſtice Foſter, conſider the word *command* as comprehending all thoſe who incite, procure, ſet on, or ſtir up any other to do the fact.

Ch. XVI. § 78. *In ſhops, warehouſes, coachhouſes &c.*

2 Hawk. ch. 33. ſ. 65. 68. 1 Hale, 565. n. Foſt. 126. Ante, 629.

§ 79. *Conſtruction of* 10 & 11 W. 3. c. 23

No force.

The words of the ſtatute are, "privately and feloniouſly "ſteal, &c.;" and therefore if the ſhop, &c. be broken, or any force uſed, it is not within the act. It was ſo ruled by Trevor, Powis, and Blencow, in the caſe of Tims and Cecil, O. B. 5th December 1711, and in Rex v. Cartwright, O. B. 1726. But the ſtat. 3 & 4 W. & M. c. 9. ſ. 1. extends to breaking. In Thomas Jones' caſe, who was indicted on this ſtatute for privately ſtealing goods out of a ſhop; it appeared that the ſhop was detached at a conſiderable diſtance from the dwelling-houſe; that it was left ſafely locked on the Saturday night, about 12 o'clock, and on the Monday morning following it was diſcovered that the ſhop had been entered, (as ſuppoſed, by a falſe key or pick-lock,) and the goods ſtolen to the value of above 700 l. There were two locks on the outward door of the ſhop, next the ſtreet, both of which were found unlocked on the Monday morning; but the door was ſhut, one of the locks being a ſpring-lock. No violence appeared to have been uſed in gaining admittance, but a deſk in the counting-houſe was wrenched open and the lock broken. The priſoner was capitally convicted: but it was objected on his behalf, that force having been uſed by breaking the lock and wrenching the deſk open, the offence was not that of *privately* ſtealing; and that the priſoner could not be convicted on this indictment. The jury found him guilty. But in Eaſter term 1787 all the Judges held the conviction wrong as to the capital part of the charge, there having been force uſed (*a*). But as the priſoner ought to have been convicted of the ſimple

2 MS. Sum. 277. 534. MS Burnet, 79. Foſt. 79.

Jones's caſe, Lancaſter Lent Aſſ. 1787, MS. Jud. MS. Buller J. & 2 MS. Sum. 277, 8.

(*a*) According to the MS. of Buller J. the opening the door with a pick-lock was a force ſufficient to take the caſe out of the ſtatute.

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felony upon this record, he was recommended for a pardon on condition of tranſportation.

Foſt. 79.

This agrees with Mr. Juſtice Foſter's deſcription of the offence under this ſtatute; which, he ſays, ſeems to exclude all caſes where *any degree of force* is uſed *to come at the goods.* But where it did not appear whether any force had been uſed or not, the caſe was adjudged to be within the ſtatute by Parker C. J. and Tracy J. and the ſame reſolution was made in a ſubſequent caſe.

R. v. Matthews, O. B. 5th April 1715.
R. v. Corder, O. B. 6th Dec. 1721, Serjt. Foſter's MS.

§ 80. *Extends only to the owner's goods.* 2 MS. Sum. 534. Howard's caſe, 1751, O. B. Foſt. 78, 9. infra.

The ſtat. 10 & 11 W. 3. alſo ſays "though the owner or "any other perſon be not in ſuch ſhop," &c. If, therefore, the goods of a ſtranger only be ſtolen, it is not within this act: for this law was intended as a ſecurity for ſhop-keepers and traders in the better protection of their goods. And upon the ſame principle, it has always been holden, that the goods ſtolen muſt be ſuch as are uſually ſold or expoſed to ſale in ſuch ſhop; and not any other valuable thing which may happen to be put there: for it was the object of the ſtatute to ſecure ſuch repoſitories for their proper purpoſes. And therefore a ſhirt left in a mercer's ſhop to be ſent to waſh was holden not to be within the act.

Kept in their appropriate places. Poſt. 85.

Vide S. C. 8 Mod 166. O. B. April, 9 Geo. 1.

Howard's caſe *, O. B. 1751, cor. Ld. C. B. Parker, Foſter & Birch Js. Foſt. 77. (*Vide* Godfrey's caſe, O. B Dec. 1783, Seſſ. Pap. No. 20. and 2 Leach, 322. et Qu.)

The words of the ſtatute are "ſhop, warehouſe," &c. John Howard was indicted on the ſtatute for privately ſtealing goods the property of Fludyer and Co. in the warehouſe of J. Day. Another count charged the priſoner with ſtealing the goods of J. D. in his warehouſe. It appeared that Day kept a common warehouſe by the water ſide, where merchants uſually lodged goods intended for exportation, until they could ſhip them. Fludyer and Co. ſent theſe goods to the warehouſe for that purpoſe, from whence they were ſtolen by the priſoner. The court held that the caſe was not within the ſtatute; for by the word *warehouſes* were meant, not mere repoſitories for goods, but ſuch places where merchants and traders kept their goods for ſale in the nature

* *Vide* Barrington on the ſtat. 487. obſerving, in contradiction to this caſe, that ſuch warehouſes, at a diſtance from the dwelling-houſe, were particularly meant to be protected by the ſtat. 10 & 11 W. 3. c. 23. and vide preface to 2d edition of Foſter's C. L. xvi.

of ſhops, and whither cuſtomers went to view them. And though there the goods might properly enough be laid to be the property of Day, ſince he had the charge of them, and was accountable for them to his principals; yet the warehouſe was not a place for ſale, but merely for ſafe cuſtody. Accordingly the priſoner was found guilty of the ſimple larceny only, and acquitted of the ſtealing privately in the warehouſe.

Ch. XVI. § 80. *In ſhops, warehouſes, coach-houſes, &c.*

Stone was indicted for privately ſtealing a watch, the property of Sir Robert Heſketh, in the ſhop of one Alcock. The proſecutor had ſent it to his watch-maker to be repaired, and it hung in the ſhow glaſs in the ſhop, from whence it was taken: yet not being there for ſale, the priſoner could not be convicted under the ſtatute.

R. v. Stone, O. B. 1784, 1 Leach, 375.

Foſt. 78.

It has alſo been rightly holden that *money* is not within the act with regard to any of the places mentioned in it; the words being "*goods, wares, and merchandizes.*" For though the word "*goods*" may, and often does, in a large ſenſe include money; yet being connected with *wares and merchandizes*, the ſafer conſtruction, in ſo penal a ſtatute, will be to confine it to goods ejuſdem generis, namely, goods expoſed to ſale. But the ſtat. 12 Ann. ſt. 1. c. 7. extends expreſsly to money.

Money. Foſt. 79. 2 MS. Sum. 277. Herbert's caſe, O. B. 1720, by Powell, Dormer, and Richardſon, Js. and Willard's caſe, ad idem.

Ante, 629.

The ſame conſtruction takes place with reſpect to coach-houſes and ſtables: the goods muſt be ſuch as are uſually lodged in ſuch places. For the legiſlature, in giving ſo high a protection to thoſe particular repoſitories, intended it only for the proper and uſual contents of them. In John Sea's caſe, the court doubted whether a livery great coat belonging to a coachman, which he had hung up in the ſtables whilſt he went into the houſe to receive his wages, could be conſidered as any part of the proper or uſual furniture of the ſtable out of which it was ſtolen: and therefore directed the priſoner to be acquitted of the capital part of the charge.

Coach-houſes and ſtables. 2 MS. Sum. 277. 334. Foſt. 78. poſt. f. 85.

Sea's caſe, O. B. 1785, Leach, laſt edit. 341.)

Ch XVI. § 81. *In dwelling-houſes and out-houſes to 40s. value.*

8. *Larceny in a Dwelling-houſe or Out-houſe thereto belonging of Money, Goods, Wares, &c. to the Value of 40 s. though the Houſe be not broken, and whether any perſon be within or not.*

§ 81. *Larceny in dwelling-houſe, &c. to 40s. value.* 12 Ann. ſt. 1. c. 7. ante, 629.

Clergy is therein taken away by the ſtat. 12 Ann. ſt. 1. c. 7. from the principals, aſſiſters, and aiders on conviction, or attainder by verdict or confeſſion; or on being indicted and ſtanding mute, or not directly anſwering, or peremptorily challenging above 20. But apprentices under the age of 16, robbing their maſters, are excepted out of the act. And neither principals outlawed, nor acceſſaries before, are included in it.

2 Hawk. ch. 33. ſ. 65. 68.

What offenders within it. 2 MS. Sum. 274. Rex v Mary Macdaniel and Eliz. Thompſon, O. B. Sept. 1784, c r. Eyre B. (*Vide* 1 Leach, 379 S. C. and Seſſ. Pap. No. 922. (*a*).) (*b*) Ann Gould's caſe, O. B. Jan. 12th, 1780, cor. Nares J. (Lord C. B. Skynner, and Aſhhurſt J. preſent and concurring), MS. Jud. (S. C. 1 Dalt. ch. 58. R. v. Davis, alias Silk, Ante, 499.

The ſtatute has been holden not to extend to a ſtealing by a man in his own houſe; for the intention of the act was to protect the owner's property in his own houſe from the depredation of others, or the property of others lodged in the owner's houſe; thereby giving protection againſt all but the owner himſelf. The ſame point was ruled by Nares J. in another caſe (*b*), where the miſtreſs of a brothel ſtole money from a ſailor who lodged in her huſband's houſe: becauſe the ſtatute extends only to the dwelling-houſe of another; and this being the houſe of her huſband was the ſame as her own. And this caſe was afterwards approved of by Skynner C. B. Aſhhurſt, Gould, and Heath Juſtices. But the ſtatute expreſsly extends to ſervants, as appears by the preamble.

Leach, 257.) Ante, 561.

The dwelling-houſe muſt be ſuch wherein burglary may be committed, and not that which is only inhabited caſually or for a ſpecial purpoſe.

§ 82. *What a ſtealing from the houſe within the ſtatute.* Ante, ſ. 80. Campbell's caſe, O. B Jan. 1792, cor. Ld. C. B. Eyre, Buller and Wilſon Js. 2 Leach, 642.

It has alſo been holden, that in order to bring a caſe within the ſtat. 12 Ann. the property ſtolen muſt be ſuch as is uſually under the protection of the houſe.

The priſoner was indicted upon the ſtat. 12 Ann. c. 7. for ſtealing in the dwelling-houſe of C. M. Adams, a bank note of 25 l. It appeared that the priſoner lodged at Mrs.

(*a*) The accomplice, tried at the ſame time with the miſtreſs of the houſe, was directed to be acquitted of the capital part of the charge.

Adams'

Ch. XVI. § 82. *In dwelling-houses and out-houses to 40 s. value.*

Adams' houſe, and that ſhe, having occaſion to change the note in queſtion, ſent her ſervant with it to the priſoner with that requeſt. The priſoner, after examining his purſe, ſaid, he had not money enough by him for the purpoſe, but he would go immediately to his banker's and get it changed; and accordingly he left the houſe with the bank note, and never returned. A queſtion aroſe at the trial, Whether the caſe were within the ſtatute, which was made to protect property depoſited in the houſe, and not that which was about the perſon of the party. After conviction the caſe was reſerved for the opinion of the Judges, who thought it was not a capital offence within the ſtatute.

Rex v. Owen, O. B. 1792, MS. Buller J. and MS. Jud. *The larceny muſt be of things under the protection of the houſe, and not of any perſon in it; therefore not of money out of his pocket.*

Edward Owen was indicted for ſtealing 105 guineas, the property of James Foreman, in the dwelling-houſe of Patrick Brady. Brady kept a public houſe in Holborn, into which Foreman was ſeduced by the priſoner, under pretence of dividing the value of a croſs which the priſoner picked up and pretended to have found in the ſtreet; and there the priſoner obtained the 105 guineas from the proſecutor, under exactly the ſame circumſtances as have been repeatedly given in evidence in the ring-dropping caſes. But it was objected that the caſe did not fall within the ſtat. of Ann. becauſe the proſecutor was neither the owner nor a ſettled inhabitant of the houſe in which the money was taken. It was further inſiſted, that this caſe muſt be taken as if the property of the proſecutor had been ſtolen out of his pocket, or otherwiſe from his perſon, without any deceit; and that the ſtatute was meant to protect property uſually kept or depoſited in the houſe, as contradiſtinguiſhed from property under the protection of the perſon: and Campbell's caſe was mentioned and inſiſted upon as an authority in point. On a conference of the Judges in Michaelmas term 1792, a majority of them were of opinion that this caſe was not within the ſtatute: for that to bring a caſe within it, the property muſt be under the protection of the houſe, depoſited there for ſafe cuſtody; as part of the furniture or money, plate, &c. kept in the houſe, and not things immediately under the eye or perſonal care of ſome one who happened to be in the houſe. The ſame point was again ruled in a ſimilar caſe of Rex v. Caſtledine, which was alſo referred to the Judges: where

Supra.

John Caſtledine's caſe, O. B. Oct. 1792, MS. Buller J.

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under a like pretence, the proſecutor, who had been decoyed into a public houſe, was prevailed upon to produce his watch and 5 guineas, which he laid upon the table, but without any agreement that the priſoner ſhould have them; who, nevertheleſs, took them up and went off with them without the proſecutor's conſent.

Poſt. f. 107.

The ſame was again ruled in Watſon's caſe in 1794.

§ 83. *Bank notes within the ſtatute.* Dean's caſe, O B. July 1795, MS. Buller J. Seſſ. Pap. for May 1796, p. 615. (S. C. 2 Leach, 798.) Milnes' caſe, ante, f. 37. Watſon's caſe, poſt. f. 107. Poſt. f. 120. Ante, f. 36.

The ſtealing of bank notes is within the act. This was ruled by all the Judges in Dean's caſe in Eaſter term 1796. The ſame point ſeems to have been taken for granted in Milnes' caſe, and in Watſon's caſe. And the like reſolution has been made in the caſe of an indictment upon the ſtat. 8 Eliz. c. 4. for privately ſtealing from the perſon. Theſe determinations were founded on the conſideration of the ſtat. 2 Geo. 2. c. 25. whereby the ſtealing of ſuch ſecurities is put on the ſame foot as the ſtealing of goods of the like value with the money ſecured by the ſame.

§ 84. *Reſult of the ſtatutes as to clergy.*

Upon the whole it may be collected, that the ouſting of clergy in the above mentioned ſtatutes concerning larcenies and robberies in houſes depends on one or more of theſe circumſtances; either where there is a breaking of the houſe; or a putting in fear of the perſons within it; or the goods ſtolen therein amount to a certain value, under certain modifications. A breaking is neceſſary under the ſtats. 1 Ed. 6. c. 12. ſ. 10. 5 & 6 Ed. 6. c. 9. 39 Eliz. c. 15. ſ. 2. and 3 & 4 W. & M. c. 9. ſ. 1. as a putting in fear is under the ſame ſtats. 1 Ed. 6. c. 12. ſ. 10. and 3 & 4 W. & M. c. 9. ſ. 1. and 23 H. 8. c. 1. ſ. 3. and the value is alſo made material by 39 Eliz. c. 15. ſ. 1. and the 3 & 4 W. & M. c. 9. ſ. 1. before mentioned, and alſo by 10 & 11 W. 3. c. 23. and 12 Ann. ſt. 1. c. 7.

In Ships, &c.

§ 85. *In ſhips, &c.* 24 Geo. 2. c. 45.

By the ſtat. 24 Geo. 2. c. 45. "All and every perſon and "perſons who ſhall feloniouſly ſteal any goods, wares, or "merchandize of the value of 40s. in any ſhip, barge, "lighter, boat, or other veſſel or craft, upon any navigable "river,

" river, or in any port of entry or discharge, or in any " creek belonging to such river or port, or upon any wharf " or quay adjacent to such river or port; or who shall be " present, aiding, and assisting in committing any such of- " fences, being thereof convicted or attainted, or being " indicted shall stand mute, not directly answer, &c. or " peremptorily challenge above 20, &c. shall be excluded " from the benefit of clergy."

Ch. XVI. §§5. *In ships, &c. on navigable rivers.*

Upon this statute the construction is generally confined to such goods and merchandizes as are usually lodged in ships, or on wharfs or quays. And therefore where George Grimes was indicted on this statute for stealing a considerable sum of money out of a ship in port; though great part of it consisted of Portugal money, not made current by proclamation, but commonly current; it was ruled not to be within the statute.

2 MS. Sum. 534. Ante, f. 80.

R. v. Grimes, Maidstone Lent Ass. 1752, Fost. 79. S. P. Leigh's case, O. B. 1764, 1 Leach, 62.

At the Old Bailey in May 1784, one Pike was tried before Adair Serjt. Recorder, on the stat. 24 Geo. 2. c. 45. for stealing a quantity of deals " in a certain barge on *the navigable river* Thames." It appeared in evidence, that as the barge with the deals, belonging to the prosecutor, was navigating down the *Thames*, the lighterman, fearful of an accident, brought it into Limehouse dock, where it was moored. By the efflux of the tide it was left aground, and in the night the boat and the deals, above the value of 40s. were stolen. The court held that the offence laid was not proved within the meaning of the statute. That in the construction of statutes, which took away the benefit of clergy, the law required that the fact laid in the indictment should be strictly proved: but in the present case, the evidence proved that the larceny was not committed *on the navigable river* Thames, but upon *the banks* of one of its *creeks*. That it was true, the statute also took away the benefit of clergy from any person who should steal to the amount of 40s. " in any port of entry or discharge, or in any *creek* " belonging to any navigable river, port of entry or dis- " charge:" but this being a different branch of the act, the indictment should have charged the fact accordingly. The prisoner therefore was only convicted of the simple larceny.

Pike's case, O. B. 1784. 1 Leach, 357. Sess. Pap. No. 625. *Indictment for stealing deals in a barge on the Thames not proved by shewing that the barge was aground in a dock in a creek of the river; to which another description in the statute applies.*

Ch. XVI. § 86. *In ſhips in diſtreſs.*

So the plundering, ſtealing, or deſtroying "of any goods "or merchandizes, or other effects from or belonging to "any ſhip or veſſel of his majeſty's ſubjects or others, which "ſhall be in diſtreſs, or which ſhall be wrecked, loſt, "ſtranded, or caſt on ſhore, in any part of his majeſty's "dominions, whether any living creature be on board or "not (*a*), or any of the furniture, tackle, apparel, proviſion, "or part of ſuch ſhip," &c. is excluded clergy by ſtat. 26 Geo. 2. c. 19.

§ 86. *In ſhips in diſtreſs.* 26 Geo. 2. c. 19. ſ. 1. *Vide* tit. Malicious Miſchief for further proviſions of this act.

12 Ann. ſt. 2. c. 18. ſ. 5. made perpetual by 4 G. 1. c. 12.

A ſimilar proviſion was before made by the ſtat. 12 Ann. ſt. 2. c. 18. made perpetual by ſtat. 4 Geo. 1. c. 12. whereby whoever ſhall "ſteal any pump belonging to a ſhip in "diſtreſs, or ſhall be aiding or abetting thereto," is excluded clergy.

26 Geo. 2. c. 19. 2.

By ſ. 2. of the ſtat. 26 Geo. 2. c. 19. "when goods or "effects of ſmall value ſhall be ſtranded, loſt, or caſt on "ſhore, and ſhall be ſtolen without circumſtances of cruelty, "outrage, or violence, it ſhall be lawful to proſecute for "ſuch offence by way of indictment for petit larceny; and "the offender, on conviction, ſhall ſuffer ſuch puniſhment "as the laws in caſe of petit larceny do enjoin or require."

Ante, ſ. 80. 85.

There does not ſeem to be the ſame reaſon for limiting the operation of the words "*any goods, &c. or other effects,*" in this ſtatute, in the ſame manner as in ſome other ſtatutes before mentioned; not only becauſe the word *effects* is of much more comprehenſive ſignification than the words "*wares or* "*merchandizes,*" uſed in thoſe ſtatutes; but becauſe the miſchief extends equally to every ſpecies of property, which can fall under theſe general words.

Offering ſhipwrecked goods for ſale. Sect. 4. Poſt. as to receivers.

By ſ. 4. of the ſame act "If any perſon or perſons ſhall "offer or expoſe to ſale any goods or effects whatſoever, "belonging to any ſhip or veſſel loſt, ſtranded, or caſt on "ſhore, as aforeſaid, and unlawfully taken away, or rea"ſonably ſuſpected ſo to have been; it ſhall be lawful for "the perſon to whom the ſame ſhall be ſo offered for ſale, "or any officer of the cuſtoms or exciſe, or any conſtable, "&c. or other peace-officer, to ſtop, take, and ſeize the "ſaid goods and effects, and with all convenient ſpeed

(*a*) This proviſion was with reference to the ſtat. 3 Ed. 1. c. 4. by which the veſſel was not to be adjudged wreck if any thing eſcaped alive.

carry

" carry the same, or give notice of such seizure to a justice " of peace: and if the person or persons who shall have " offered the same for sale, or some other on their behalf, " shall not appear before the said justice within ten days " next after such seizure, and make out to his satisfaction " the property of the said goods, &c. to be in them or those " by whom they were employed to sell the same; then the " said goods, &c. shall by order of the said justice be forth- " with delivered to the use of the owner on payment of a " reasonable reward, (to be fixed by the justice,) to the per- " son seizing: and such justice shall and may commit the " person or persons who have so offered or exposed the same " to sale to the common gaol for six months, or until he " shall have paid the owner, or any lawfully authorized to " receive it, treble the value of such goods," &c.

Ch. XVI. § 86. *In ships in distress.*

By s. 8. of the same act, " If oath shall be made before " any magistrate, lawfully impowered to take the same, of " any such plunder or theft, and the examination in writing " thereupon taken shall be delivered to the clerk of the " peace of the county, riding, or division, wherein such " fact shall be committed, or to his deputy; or if oath shall " be made before any such magistrate of the breaking any " such ship, contrary to the aforesaid act made in the 12th of " Queen Anne, and the examination in writing thereupon " taken shall be delivered to such clerk of the peace, or his " deputy; then such clerk of the peace shall cause the of- " fender or offenders in any of the said cases to be forth- " with prosecuted for the same, either in the county where " the fact shall be committed, or in any county next adjoin- " ing; in which adjoining county any indictment may be " laid by any other prosecutor. And if the fact be com- " mitted in Wales, then the prosecution shall or may be " carried on in the next adjoining English county. And the " necessary charges of such prosecutions by the clerk of the " peace shall be paid by the treasurer of the county, &c. " where the fact shall be committed, to such amount as the " justices of the peace shall order. And if such clerk of the " peace shall neglect or refuse to carry on such prosecution " in due manner, he shall forfeit 100l. for every such " offence to any person or persons who shall sue for the " same," &c.

26 G. 2. c. 19. s. 8. *Where prosecution by clerk of peace, or in another county.*

Vide post. s. 156.

In

Ch. XVI. § 87. *In Northern counties.*

In Northern Counties.

§ 87. *In Northern counties.*

The ſtat. 43 Eliz. c. 13. levelled againſt ſuch as are guilty of perſonal violence and rapine, in the northern counties of Cumberland, Northumberland, Weſtmoreland, and the Biſhoprick of Durham, which has been before adverted to; reciting that perſons had been carried from them into other counties as priſoners, and kept barbarouſly and cruelly, until they were redeemed by great ranſoms; and alſo that of late there had been many incurſions, robberies, and burning and ſpoiling of towns, villages, and houſes within the ſaid counties, ſo that divers ſubjects there had been forced to pay a certain rate of money, corn, cattle, or other conſideration, commonly called *Black Mail*, to divers perſons inhabiting upon or near the borders, &c. in alliance with great robbers and ſpoilers in thoſe parts, &c. enacts, that whoever ſhall ſo take away, detain, force, or impriſon, any perſons within the ſame counties, or againſt their wills, to ranſom them, or make ſpoil of their goods, &c. "or whoever "ſhall take, receive, or carry to the uſe of himſelf, or wit- "tingly to the uſe of any other, any money, corn, cattle, or "other conſideration, commonly called Black Mail, for the "protecting or defending of him or them, (i. e. the true men) "their lands, goods or chattels from ſuch thefts, ſpoils, and "robberies as aforeſaid, and ſhall be indicted and lawfully "convicted of any the ſaid offences, or ſtand mute, or chal- "lenge peremptorily above 20, before the juſtices of aſſize, "gaol delivery, oyer and terminer, or juſtices of the peace "within any of the ſaid counties, ſhall be adjudged felons "without benefit of clergy."

43 Eliz. c. 13. *Vide* ante, p. 430. the preamble, for &c.

Vide 6 Geo. 2. c. 37. ſ. 9, 10. regulations in aid of this act, and 13 & 14 Car. 2. c. 22. made perpetual by 31 G. 2. c. 42.

(*Vide* poſt. tit. Malicious Miſchief for other offences therein mentioned.)

The benefit of clergy is taken away "from great, known, "and notorious thieves and ſpoil-takers, both in Cumber- "land and Northumberland, on conviction, for theft done "within the ſame:" or otherwiſe the juſtices of aſſize, oyer and terminer, or gaol delivery, before whom they are convicted, may tranſport them for life.

18 Car. 2. c. 3. continued by 6 Geo. 2. c. 37. made perpetual by 31 Geo. 2. c. 42.

6. *To whom the Property ſtolen ſhall be charged to belong.*

§ 88. *In whom the property.* Ante, ſ. 40.

It has been already ſhewn, that ſome things are not the ſubjects of property at all, or only ſo ratione loci or privi-

legii,

regii, and that others are only such sub modo, that is where some person has acquired a special dominion over them. But with respect to things which are the regular subjects of property, felony may be committed in stealing them, though the owner be not known; for the guilt of the thief is the same. And he may be charged in the indictment with having stolen the goods of a person to the jurors unknown; or with having received goods stolen by a person unknown. And in such case the king shall have the goods. But if the owner be really known, an indictment alleging the goods to be the property of a person unknown, would be improper: in that case the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. And in prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious or *invito domino;* for it is not enough that the prisoner is unable to give a good account how he came by the goods.

Ch XVI. § 88. *Goods of person unknown.*

Goods of person unknown.
2 MS. Sum. 250.
1 Hawk. ch. 33. s. 29.
1 Hale, 512.
2 Hale, 181. 290.
Staundf. 95. b.
4 Blac Com 235.
post. tit. Receivers.
Rex v. Thomas, post. f. 163.

Post. 657.

This seems to be the true ground upon which persons indicted for stealing any goods in themselves the subject of property, but whereof no owner can be found, are in any instance, (the fact of taking, &c. *lucri causâ* being proved,) entitled to an acquittal. For the true owner by losing them does not lose the property in them until seizure by some other person having a right to seize in such cases. And as the form of the indictment, laying them to be the property of a person unknown, is good, the only difficulty lies in proving that the taking was felonious, or *invito domino*.

§ 89.

He who steals the bells or other goods of a chapel in time of vacation, may be indicted for stealing the goods of the chapel, being in the custody of such and such; or in the case of a parish church, they may be laid to be the goods of the parishioners. But in an indictment on the stat. 4 Geo. 2. c. 32. for stealing lead from Hendon church, it was holden not necessary to lay the property in any person, though it might be laid to be the property of the vicar. But that case turned on the particular nature of the property protected by the statute.

Goods of a church.
1 Hawk. ch. 33. s. 29.
1 Hale, 512.

Ante, f. 31.
Watf. Cler. Law, 391.

There

Ch. XVI. § 89. *Goods of a church.*

Corpse, &c. Haynes's case, 12 Co. 113. 4 Blac. Com. 235 *. Rex v. Lynn, 2 Term Rep. 733. MS. Tracy, 67. M. 23 Geo. 2. 3 Inst. 110. 1 Hale, 515.

(*a*) Serjt. Forster's MS.

There can be no property in a dead corpse; and therefore stealing it is no felony, but a very high misdemeanor. In the case of Dr. Handyside, where trover was brought against him for two children that grew together; Lord C. J. Willes held the action would not lie, as no person had any property in corpses. But a shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself. Some years since several persons were convicted and transported for stealing leaden coffins out of the vaults in St. Andrew's, Holborn, and they were laid to be the goods of the executors (*a*). But if it do not readily appear who is the personal representative of the deceased, laying it to be the goods of a person unknown is sufficient. Thus at Exeter Lent assizes 1794 a man was tried before Buller J. for stealing a leaden coffin, the property of a person unknown; and in another count it was laid to be the property of certain persons, being the then churchwardens. The latter, it was at once decided, could not be supported: and to the former it was objected, that though the coffin had lain in the ground near 60 years, yet the same family, of which the deceased had been a member, remained on the spot: and it did not even appear that any inquiry whatever had been made to ascertain the fact; which shewed a want of reasonable diligence in the prosecutor: but it was ruled to be sufficient after so many years had passed. Again, if the goods of any intestate be stolen before administration, they shall be supposed to be the goods of the ordinary: or if an executor be appointed, the goods shall be said to be his before probate: and they need not shew their title specially as ordinary or executor, because it is founded on their own possession.

Ante, f. 88.

1 Hale, 514.

§ 90. *Special property or possession.* 2 MS. Sum. 249. 1 Hale, 513. 1 Hawk. ch. 33. f. 30. Kel. 39 45. Burnet's MS. Sum. 67.

Any one who has a special property in goods stolen may lay them to be his in an appeal or indictment for larceny; as a bailee, pawnee, lessee for years, carrier, or the like; a fortiori, they may be laid to be the property of the respective owners; and the indictment is good either way. But if it appear in evidence, that the party whose goods they are laid to be had neither the property nor the possession, [and so this

his purpose the possession of a feme covert or servant is, generally speaking, the possession of the husband or master,] the prisoner ought to be acquitted on that indictment. The same rule prevails in the case of goods belonging to a guest (*a*), stolen at an inn; they may be laid to be the property either of the innkeeper or the guest. So, goods stolen from a washerwoman (*b*), who takes in the linen of other persons to wash, may be laid to be her goods; by Parker C. J., Tracy and Bury Js.; for persons of this description have a possessory property, and are answerable to their employers; and could all maintain an appeal of robbery or larceny, and have restitution. So an agister has a possession and property against all but the right owner. Parker, Bury B. and Tracy J.

Ch. XVI. § 90. *Goods of intestate, &c.*

Keilw. 70. b. pl 7. Moor, 248. Staunf. 28. b.

(*a*) Jane Todd's case, O. B. 4th July 1711, by Ld. C. J. Eyre and Ld. C. B. Ward, Burnet's MS. Sum. 67.

(*b*) Ralph Packer's case, O. B. 7th April 1714, ib cor. Ld. C. J. MS. Burnet.

In John Woodward's case, who was indicted for maliciously and feloniously killing two sheep, the property of W. Dalton, it was proved that the prosecutor had only taken the sheep in to agist for another. Whereupon it was objected that the property was not well laid in the agister; and upon reference to the Judges in Michaelmas term 1796, one of them doubted at first, because an agister of cattle is not liable for them at all events, like an inn-keeper for the goods of his guest. The majority, however, thought the conviction right. But the matter stood over till Hilary term 1797, when upon reference to 4 Inst. 293. shewing that an agister has a possession; and 2 Rol. Abr. 551. that he may maintain trespass against any who takes the beasts, all the Judges agreed that the conviction was right.

Woodward's case, Leicester Sum. Ass. 1796, cor. Perryn B. MS. Jud. *Property laid in agister of cattle.* (*vide* Moor, 543.)

(Absent Buller J.)

James Deakin and William Smith were indicted for stealing spoons and other articles, laid in the second count, (on which alone they were convicted,) to be the property of one Markham. The goods had been sent by a tradesman in London to Mr. Broderick at Spalding, by the Spalding coach, and were stolen by the prisoners at Ponderseud, out of the boot behind the coach. The question was, Whether they were properly laid to be the property of Markham, who was not the owner, but only the driver of the coach; there being no contract between him and the proprietors, that he should be liable for any thing stolen; and it not appearing that he had been guilty of any laches. The case being referred to the Judges, it stood over for some time; but finally the

R. v. Deakin & Smith, O. B. April 1800, cor. Grose J. MS. Jud. *Property laid in stage-coachman.*

Vide Taylor's case, 1 Leach, 395. ad idem.

Ch. XVI. § 90. *Special property, &c.*

the conviction was holden right; the coachman having the poſſeſſion, and a ſpecial property in the goods committed to his charge.

Larceny by the owner. Ante, 558. 1 Hale, 513.

Upon the ſame principle it is that a man may be guilty of larceny or robbery of his own goods. For if A. bail goods to B. and afterwards animo furandi ſteal them from him, with deſign probably to charge him with the value: or, if A. ſend his ſervant with money, and afterwards way-lay and rob him, with intent to charge the hundred: in either caſe the felony is complete. And even in this latter caſe, I ſee no objection to laying the property of the goods in the ſervant; for though in general it may be ſaid that he has no property in them as againſt his maſter, although he has againſt every other perſon; yet having a clear right to defend his poſſeſſion againſt A.'s unlawful demand, the ſpecial property ſtill remains in the ſervant. But a taking from the ſervant of the money or goods of his maſter, in his preſence, by putting in fear, is a taking from the maſter, and the offender may be indicted of robbing him.

1 Hawk. ch. 34. ſ. 5. Burnet's MS. Sum. 73. Styl. 156. MS. Tracy, 73. 1 Show. 94. 241.

On the other hand, it being a ſettled principle, that neither the property nor poſſeſſion in law of goods is changed by any felonious taking of them; it follows that if A. ſteal goods of B., and after C. ſteal the ſame goods from A.; C. is a felon both as to A. and B.; and he may be indicted of ſtealing the goods of B.

1 Hale, 507. 2 MS. Sum. 238. Sum. 64.

§ 91. *Neceſſaries for children.* 12 Rep. 113. 1 Sid. 129.

Cloaths and other neceſſaries provided for children by their parents, are often laid to be the property of the parents, eſpecially while the children are of tender age; but it is holden good either way. At the ſeſſions at the O. B. after Eaſter term 1701, Tracy and Turton Js. and Lovell Recorder, doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, who had been an ancient clerk of the court, ſaid that it had always been uſual to lay it to be the goods of the child in ſuch caſe: and that many indictments which had laid them to be the property of the father had been ordered to be altered by the Judges.

MS. Tracy, 67.

An

An indictment for sheep stealing laid the property to be in Simon Dodd, the elder, S. D. the younger, John and Gilbert Dodd, and several others of the same name. Simon Dodd the elder proved that he and his son (now dead), took a farm on their joint concern, and kept a stock of sheep, their joint property, upon it. The son died intestate about five years ago, leaving a widow, who died soon after him, and several children (the children named in the indictment). No division was ever made of the stock; from which all the sheep upon the farm at the time of the felony committed were bred, some before and some after the son's death. S. D. the elder continued to occupy the farm and use the stock as before, considering himself acting for his grandchildren, who were still infants, in respect of one moiety; and accordingly continued to keep a regular account with them in his books. After conviction a question was submitted to the Judges, Whether the property were well laid jointly in the grandfather and grandchildren. And in Michaelmas term 1801, they all held it well enough: for at any rate, though in the case of joint traders there were no jus accrescendi, and the remedy survived: yet here the grandfather swearing that he held one moiety for his grandchildren, no person could controvert it, and he might make distribution among them. And some of the Judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent.

Ch. XVI. §91. *Necessaries for children.*

John's Scott's case, Northumberland Sum. Ass. 1801, cor. Chambre J. MS. Jud.

I now proceed lastly to examine

7. *What is such Evidence of the taking and carrying away being fraudulent or wrongful, with Intent to convert the Goods to the Taker's own Use, and make them his own without the Consent of the Owner, as amounts to Felony.*

§ 92. *Evidence of felonious intent.*

The felonious intent is essential to the offence; and in order to make it felony, the intent to steal ought to be at the time when the party first gets possession of the goods; such a possession at least as is distinct from that of the owner; for a fraudulent intent, originating afterwards, to convert the goods to his own use is not felony: but the original felonious intent may be collected from subsequent acts.

Pult. 129. Staundf. 25.

This

Ch. XVI. § 92. *When originating.*

This inquiry may be beſt made by conſidering the ſeveral defences by which charges of this nature are endeavoured to be palliated or denied. Theſe are,

Defences in larceny.

1. *By a Denial of the Fact itſelf, or the Party's Participation in it.*
2. *That the Goods were taken upon a Claim of Right, or by Act of Law.*
3. *By Miſtake or Accident.*
4. *As a Treſpaſſer or Wrong-Doer, without Fraud.*
5. *By finding.*
6. *By Delivery of a third Perſon, without Knowledge of the Theft by the Taker.*
7. *By Delivery from or on Behalf of the Owner; or by a Taking with his Conſent and Approbation.*
8. *By taking upon Neceſſity.*

1. *By a Denial of the Fact, &c.*

§ 93. *Evidence upon a denial of the fact. Vide* 2 Hale, 289.

It may be laid down generally, that wherever the property of one man, which has been taken from him without his knowledge or conſent, is found upon another, it is incumbent on that other to prove how he came by it; otherwiſe the preſumption is that he obtained it feloniouſly. This, like every other preſumption, is ſtrengthened, weakened, or rebutted, by concomitant circumſtances, too numerous in the nature of the thing to be detailed. It will be ſufficient to allude to ſome of the moſt prominent; ſuch as the length of time which has elapſed between the loſs of the property and the finding it again; either as it may furniſh more or leſs doubt of the identity of it; or as it may have changed hands oftener in the mean time; or as it may increaſe the difficulty to the priſoner of accounting how he came by it: in all which conſiderations that of the nature of the property muſt generally be mingled. So the probability of the priſoner's having been near the ſpot from whence the property was ſuppoſed to be taken at the time; as well as his conduct during the whole tranſaction, both before and after the diſcovery, are material ingredients in the inveſtigation. But the bare circumſtance of finding in one's poſſeſſion property of the ſame kind which another has loſt, unleſs that other can from marks or other circumſtances ſatisfy the court and jury

Length of time.

Nature of the property. Priſoner's vicinity to the ſpot. Behaviour.

Identity.

jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though, where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the court are warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus a man being found coming out of another's barn; and upon search, corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. Ch. XVI. § 93. *On denial of fact.*

So persons employed in carrying sugar and other articles from ships and wharfs have often been convicted of larceny at the O. B., upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could no otherwise be proved. But this must at least be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them; for Lord Hale says he would never convict any person of stealing the goods of one unknown, merely because he could not give an account how he came by them; unless due proof were made that a felony had been committed of those goods. 2 Hale, 290. *Vide* ante, 651.

Neither is the fact of concealment, (the identity of the property not being proved,) of itself evidence of stealing, though undoubtedly very strong corroborative proof of it. *Concealment.* 3 Inst. 98.

§ 94.

The confession of the prisoner that he stole the goods is often adduced in this case. And here, as upon other occasions, care must be taken previous to the inquiry to ascertain with certainty that such confession was not procured either by promise or threat; in either of which cases it ought not to be received in evidence. But it frequently happens that by means of such confession, so improperly drawn from the prisoner, the prosecutor comes to the knowledge where the goods are concealed, and in consequence regains possession of them: in which case it has been said by some, that such confessions ought to be received in evidence, corroborated by the fact of finding the goods in the place described by the prisoner. This, it is said, does away the reason upon which the general rule, that confessions so improperly ob- *Confession.* *Vide* tit. Evidence.

Ch. XVI. § 94. *Confeſſion.*

tained cannot be received in evidence, is founded; becauſe the reaſon being to guard againſt the poſſibility of an innocent perſon being from weakneſs ſeduced to accuſe himſelf, in hopes of obtaining thereby more favour, or for fear of meeting with worſe puniſhment; that reaſon is done away if ſuch confeſſion be ſubſtantiated by an actual finding of the goods accordingly in the place deſcribed, which could not probably be known to the party if he were not privy to the felony. But this opinion muſt it ſeems be taken with ſome grains of allowance; for even in ſuch caſe, the moſt that is proper to be left to the conſideration of the jury is the fact of the witneſs having been directed by the priſoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the priſoner's having ſtolen or put them there, which is to be collected or not from all the circumſtances of the caſe: and this is now the more common practice.

Per Le Blanc J. in R. v. Grant and Craig, Exeter, March 1801. Per Heath J. at Exeter, about at 1790, Rex v. Marian Hodge, Wells Sum. Aſſ. 1794, cor. Groſe J. Warrickſhall's caſe, O. B. 1783, cor. Nares J. and Eyre B. 1 Leach, 298.

Mozey's caſe, O. B. 1784, cor. Perryn B. and Buller Js. ib. 301. n.

Harvey's caſe, Bodmin Sum. Aſſ. 1800.

In the caſe of Richard Harvey at Bodmin Summer aſſizes 1800, Lord Eldon ſaid, that where the knowledge of any fact was obtained from a priſoner under ſuch a promiſe as excluded the confeſſion itſelf from being given in evidence, he ſhould direct an acquittal; unleſs the fact itſelf proved, would have been ſufficient to warrant a conviction without any confeſſion leading to it. And he ſo directed the jury in that caſe. In Lockhart's caſe, who was indicted for ſtealing jewels, a confeſſion having been obtained from him upon promiſes of favour that he had ſtolen the jewels, and had diſpoſed of part of them to a Mr. Grant; the latter was admitted as a witneſs to prove that he had received them from the priſoner.

Lockhart's caſe, O. B. 1785, 1 Leach, 430.

Where a priſoner has been once induced to confeſs upon a promiſe or threat; it is the common practice to reject any ſubſequent confeſſion of the ſame or like facts, though at a ſubſequent time. But in one caſe where hopes had been holden out to a priſoner to confeſs; and when brought before a magiſtrate, he refuſed unleſs upon conditions; Buller J. admitted the general rule with ſome qualification, by obſerving that there muſt be very ſtrong evidence of an explicit warning by the magiſtrate not to rely on any expected favour on that account; and it ought moſt clearly to appear that the priſoner thoroughly underſtood ſuch

ſuch warning, before his ſubſequent confeſſion could be given in evidence. Ch. XVI. § 94. *Confeſſion.*

As to what ſhall be conſidered as a threat or promiſe, ſaying to the priſoner that it would be worſe for him if he did not confeſs, or that it would be better for him if he did, is ſufficient to exclude the confeſſion, according to conſtant experience.

2. *That the Goods were taken on a Claim of Right.*

§ 95. *On claim of right. By the party's own act.* Ante, 558. 1 Hale, 513.

Goods may be ſo taken by the party's own immediate act, or by the act of the law through his means. In the firſt place it has been ſhewn that a man cannot be guilty of felony in taking his own goods, unleſs where having bailed them to another, he afterwards ſteal or rob him of them in order to charge him or the hundred. For elſe, if a man take another's trees and cut them into boards; or take the other's cloth and make it into a doublet and embroider it; or mingle the other's corn with his own: in all theſe caſes the owner may retake his boards, cloth, and the whole of the corn, (ſo much at leaſt, I preſume, as cannot eaſily be diſtinguiſhed from his own,) without being guilty of felony.

And here it may be proper to remark, that in any caſe if there be any fair pretence of property or right in the priſoner, or if it be brought into doubt at all, the court will direct an acquittal; for it is not fit that ſuch diſputes ſhould be ſettled in a manner to bring men's lives into jeopardy.

The owner of ground takes a horſe for damage feaſant, or a lord ſeizes it as an eſtray, though perhaps without title; yet theſe circumſtances explain the intent, and ſhew that it was not felonious, unleſs ſome act be done which manifeſts the contrary; as giving the horſe new marks to diſguiſe him, or altering the old ones; for theſe are preſumptive circumſtances of a thieviſh intent. 1 Hale, 506, 7.

After a ſeizure of uncuſtomed goods, ſeveral broke at night into the houſe where they were depoſited, with intent to retake them for the benefit of the former owner: it was holden that ſuch a deſign appearing rebutted the preſumption of a felonious deſign to ſteal, which was laid in an indictment for burglary; however elſe the parties were culpable in doing ſuch an act. Rex v. Knight and another, Ante, 519.

Ch. XVI. § 96. *On claim of right.*

§ 96. *By act of law.*

What has been juſt ſaid of a colourable title will of courſe apply in at leaſt as ſtrong a degree to the next ſubject of conſideration; where a party gets poſſeſſion of another's goods by act of law. But however difficult it may be to eſtabliſh proof of a felonious intent in ſuch caſes, yet if the fact be clearly made out, it is one of the higheſt aggravations of the offence of larceny. It is converting the proceſs of the law, which is the beſt ſecurity for property, into an inſtrument of rapine and plunder.

1 Hale, 507. 3 Hawk. ch. 33. ſ. 8. 3 Inſt. 108.

A. having a deſign to ſteal B.'s horſe, which was impounded on a diſtreſs, enters a plaint of replevin in the ſheriff's court for the horſe; and thereby getting it delivered to him, runs away with it: or intending to ſteal the goods of B. in his houſe, he delivers an ejectment fraudulently; and having obtained judgment againſt the caſual ejector, he gets poſſeſſion and goes off with the goods: it is felony in either caſe.

Farr's caſe, O. B. 1665, cor. Hyde Ch. J. Kelyng and Wild Ja. Kel. 43. T. Raym. 276.

Richard Farr and Eleanor Chadwicke were indicted for breaking the houſe of Robert Stanyer, and putting his wife in fear, and ſtealing goods from thence. It appeared that the priſoners, intending to rifle the houſe in which Mrs. Stanyer lived apart from her huſband, went to an attorney, and pretending that Mrs. Stanyer was Farr's tenant, and in arrear for rent, obtained poſſeſſion of the houſe by means of a fraudulent ejectment; and at the ſame time arreſted Mrs. Stanyer under a writ of latitat, and cauſed her to be carried to priſon; and then the priſoners rifled the houſe and took away the goods, and hid ſome, and altered the marks upon the others, and ſold the reſt. And being queſtioned concerning theſe acts, and aſked what colour of title they had to the houſe or the goods, they could pretend none. But it appeared that the true landlord had received the rent of it for many years, and that no rent was in arrear. Neither could they pretend to any cauſe of action againſt Mrs. Stanyer. Upon which the jury were directed, that if they believed that the priſoners had done all this with an intent to rob, they ought to find them guilty; which was accordingly done; and they were both executed. So if under pretext or colour of a capias utlagatum, ſued out after an outlawry clandeſtinely obtained againſt a viſible man, his goods be taken with a felonious intent, it will be felony.

Ch. XVI. § 97. *By miſtake or accident.*

3. *By Miſtake or Accident.*

§ 97. *By miſtake or accident.* 2 Hale, 507, 9.

Analogous to the taking upon a claim of right is the taking by miſtake ariſing from heedleſſneſs, or from mere accident. As if one man's ſheep mix with another's flock, and he drive them with his own, or even ſheer them, not knowing or taking heed of the difference; it is no felony. But if he knew them to be another's, as by having that other's mark which he defaces, and places his own mark on them; this is evidence of a felonious intent. So it is if he appear deſirous of concealing the property, or of preventing the inſpection of the owner, or of any who might make the diſcovery: or if, being aſked, he deny the having them; although his knowledge thereof be proved. In like manner the contrary mode of conduct in theſe ſeveral reſpects is evidence to rebut the felonious intent.

4. *On taking as a Treſpaſſer, without Fraud.*

§ 98. *As a treſpaſſer.* 1 Hale, 509. 4 Blac. Com. 232.

The taking may amount only to a treſpaſs, and the circumſtances in ſuch caſe muſt guide the judgment. As where a man takes another's goods openly before him or before other perſons, otherwiſe than by apparent robbery; or having poſſeſſed himſelf of them, avows the fact before he is queſtioned.

So where a man takes another's harrow or plough, and after plowing his own land, returns it to the place whence he took it, or tells the owner of his uſing it. So taking a horſe off the common, and after riding, returning it there again, is but a treſpaſs. But if the party had ſold it, this would be declarative of the firſt taking being felonious; and in doubtful caſes the ſafeſt rule is to incline to acquittal rather than conviction.

The felonious intent being as eſſential to conſtitute the offence of robbery as of larceny, it follows that if ſuch intent be wanting, though goods be taken by ſuch force or putting in fear as would otherwiſe be ſufficient to conſtitute robbery, yet it will only amount to a treſpaſs. A traveller met a fiſherman with fiſh, who refuſed to ſell him any; and he by force and putting in fear took away ſome of his fiſh, and threw him money much above the value of it: and judgment was reſpited, becauſe of the doubt whether the intent were

Burnet's MS. 71. Lamb. 269. Crompt. Juſt. 34. b. The fiſherman's caſe, York, 26 Eliz.

Ch. XVI. § 98. *As a treſpaſſer.*

felonious on account of the money given. Such, however, ſeem properly to be queſtions for the conſideration of the jury. And the circumſtance of the party's offering the full value or more at the time ought to be left to them to ſhew that his intention was not fraudulent, and ſo not felonious: for it does not neceſſarily follow as a concluſion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious (*a*); though it is, I apprehend, pregnant evidence in the negative. But if it appear that the offering a price be merely a pretence for fraudulently acquiring another's property (*b*); as where the owners of corn or flour were compelled by individual force, or the threats of a mob, to take much leſs than it was worth; that ſhews the intent to be fraudulent and felonious; or, according to the civil law, *lucri cauſâ:* and the parties are guilty of felony. The diſtinction in theſe caſes ſeems to turn on the fraud, which is of the eſſence of theſe offences, as was at firſt ſhewn. And this is exemplified by a caſe of ſtill greater nicety, where the original aſſault was clearly with a felonious intent; and yet the taking of the goods was no more than a treſpaſs. At the O. B. 1698, before Holt C. J. and other Judges, it was found that A. aſſaulted B. on the highway with a felonious intent, and ſearched the pockets of B. for money, but finding none, A. pulled off the bridle of B.'s horſe, and threw that and ſome bread which B. had in pannels about the highway, but did not take any thing from B.: and reſolved upon conference with all the Judges, that this was no robbery, becauſe nothing was taken from B. The better reaſon ſeems to be, that the particular goods taken were not taken with a felonious intent; for ſurely there was a ſufficient taking and ſeparation of the goods from the perſon.

(*a*) Per Groſe J. R. v. Lane and others, Bodmin Sum. Aſſ. 1796.
(*b*) Simmons's caſe, poſt. f. 128. Burrows v. Wright, 1 Eaſt's Rep. 615. and Greaſley v. Higginbottom, ib. 636.
Juſt. Inſt. 4. f. 1.

Ante, f. 2.

O. B. 1698, MS. Tracy, 71. Ex relatione Ward C. B. from his MS.

Philipps and Strong were indicted for ſtealing a mare and gelding of John Goulter. It appeared in evidence that the priſoners had gone to the ſtables of Goulter, who kept an inn at a place called Petty France, in the night of the 26th of February laſt, opened them, and taken out the horſe and mare, the ſubject of the indictment, and rode on them to Lechlade about 32 or 33 miles off, where they carried them to different inns, and left them in care of the oſtlers, directing

Philipps and Strong's caſe, Glouceſter Sp. Aſſ. 1801, cor. Lawrence J. MS. Jud. *The priſoners enter another's ſtable at night, and take out his horſes and ride them 32 miles and leave*

Ch. XVI. § 98. *As a trespasser.*

directing them to clean and feed them, and saying that they should return in three hours. In the course of the same day the prisoners were taken at a distance of 14 miles from Lechlade, walking towards Farringdon in Berkshire, in a direction from Lechlade. The jury being directed to consider, whether the prisoners when they took the horse and mare intended to make any further use of them than to ride them, for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out; and whether they intended to return to Lechlade, and make any further use of them; found the prisoners guilty; but added, they were of opinion that the prisoners meant merely to ride them to Lechlade, and to leave them there; and that they had no intention to return for them, or to make any further use of them. Upon this finding, at a conference first in Easter, and afterwards in Trinity term, 1801, the Judges, (dissentiente Grose J. et dubitante Lord Alvanley (*a*),) held it to be only a trespass and no felony. For there was no intention in the prisoners to change the property, or make it their own; but only to use it for a special purpose, i. e. to save their labour in travelling. The Judge who dissented thought the case differed from those first above-mentioned; because here there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them. But the rest agreed that it was a question for the jury; and that if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned.

them at an inn, and are afterwards found pursuing their journey on foot. On a finding by the jury that the prisoners took the horses merely with intent to ride and afterwards leave them, and not to return or make any farther use of them; held trespass and not larceny.

5. *On a Taking by Finding.*

§ 99. *By finding.* 1 Hale, 506, 7. 3 Inst. 98. 1 Hawk. ch. 33. s. 3. Ante, f. 88.

Another defence is, that the goods were found. This is connected in great measure with the first mentioned mode of defence. It is the most trite excuse in cases of larceny, and in general the least founded. Still if the fact be so; as where one finds a purse in the highway, which he takes and carries away; it is no felony; although it may be attended with all those circumstances which usually prove a taking

(*a*) His Lordship, who had been recently called to the bench of C. B., not having been present when the case was first under consideration, declined giving any express opinion.

Ch. XVI. § 59. *On finding.*

with a felonious intent; such as denying or secreting it. However, this must be understood where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence. Therefore where a man's goods are in such a place where ordinarily they are or may be placed, and a person takes them away with a view to convert them to his own use, the pretence of finding is no excuse. Thus the taking of another man's horse from his own or his neighbour's ground or common, with intent to steal it, is felony. One hides a purse of money in his corn mow; his servant finding it takes part of it: if by circumstances it can appear that he knew his master laid it there, it is felony. But then the circumstances must be pregnant; otherwise it may be reasonably interpreted to be a bare finding, because the purse was deposited in so unusual a place. But where a gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use; held felony: for he must have known where he took up the gentleman and his trunk, and where he set him down; and therefore he ought to have restored it to him. A similar circumstance occurred again at the O. B. in 1786. The prisoner Wynne, who was a hackney coachman, had taken up Mr. Weldon the prosecutor, with several packages, at the Adelphi, and set him down in Orchard Street, where the prisoner and a servant took all the things out of the coach, except one corded box, which was put under the seat, and contained several articles; for the stealing of which, and the box itself, the prisoner was indicted. The prisoner being then discharged, drove off; soon after which the box was missed. In a few days the prisoner was traced and taken, and the box found, in consequence of a direction from him, at a Jew's, uncorded, and part of the goods only in it; particularly several papers were missing, and among them two bonds mentioned in the indictment. The jury were of opinion under the circumstances, that the coachman uncorded the box and destroyed the papers, with an intent to embezzle the goods found in the box; and found him guilty. And in Easter Term 1786 a majority of the Judges held the conviction proper. Austin's case at the O. B. in 1777 was there mentioned as in point.

Lamb's case, O. B. 1694, Serjt. Forst MS. *Stealing box left in hackney coach.*

Wm. Wynne's case, O. B. 1786, cor. Eyre B. 2 MS. Sum. 231. and MS. Gould and Puller Js. (S. C. 1 Leach, 460.) *Stealing box left in a hackney coach.*

Post. f. 115.

(Absent Lord Mansfield C. J. the Ch. B. and Nares J.)

point. On the other hand, evidence to shew that the finder endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that he could not be found; or that he made known his acquisition, so that he might make himself responsible for the value in case he should be called upon by the owner; are circumstances to rebut the implication of a felonious taking and conversion.

Ch. XVI. § 99. *On finding.*

6. *On a Possession by Delivery of a Third Person.*

§ 100. *By delivery from a third person, the party not knowing of the felony.*

It has been stated before that the person in whose possession stolen goods are found must account how he came by them; otherwise he may be presumed to be the thief. And it is a common mode of defence to state a delivery by a person unknown, and of whom no evidence is given: little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen where persons really innocent have suffered under such a presumption; and therefore where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence from the time when the goods might first be presumed to have come into his possession. This defence may also be more or less probable on account of the length of time which has elapsed from the losing of the goods by the owner to the finding of them in the prisoner's possession, which I have before adverted to.

Ante, f. 93.

Ante, 556.

§ 101. *Taking on delivery by or on behalf of the owner; or by his consent and approbation.*

The most comprehensive and most intricate line of defence is,

7. *That the Goods were delivered to the Prisoner by or on Behalf of the Owner; or were taken with his Consent or Approbation:*

For if it be proved that there was no trespass or felonious intent in *taking* the goods, no subsequent conversion of them can amount to felony.

1 Hawk. ch. 33. f. 2, 3.

The primary inquiry to be made is, Whether *the taking* were *invito domino*, or without the will or approbation of the owner: for this is of the very essence of larceny, and its kindred offence robbery. And therefore where one Salmon conspired with Macdaniel and other persons to procure

Rex v. Macdaniel and others, O. B. 1755, Fost. 121. 4 Blac. Com. 230.

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procure two others, ignorant of the deſign, to rob him on the highway, in order to procure to themſelves the reward given by act of Parliament for apprehending robbers on the highway; and he accordingly went, in purſuance of ſuch agreement, to the place appointed, where the ſuppoſed robbery was effected; the caſe was holden not to amount to felony.

Norden's caſe, O. B. 1754, Foſt. 129.

Yet in another caſe one Norden, having been informed that one of the early ſtage coaches had been frequently robbed near the town by a ſingle highwayman, reſolved to uſe his endeavours to apprehend him: for which purpoſe he put a little money and a piſtol into his pocket, and attended the coach in a poſt chaiſe till the highwayman approached the carriages, and preſenting a weapon, demanded the money of the paſſengers. Norden gave him his money; and then jumping out of the chaiſe with his piſtol in his hand, with the aſſiſtance of ſome others, took the highwayman. This was ruled clearly to be robbery, and the felon was convicted. For this caſe differed widely from the former: there was no previous concert with the highwayman directly or through the medium of others that the robbery ſhould be effected, or any thing to leſſen the danger of the attempt.

Rex v. Eggington and others, Stafford Sp. Aſſ. 1801, MS. Jud. S. C. ante, 496. *The owner of goods, knowing of an intention in the priſoners to ſteal them, they having plotted ſo to do with his ſervant, directed his ſervant to carry on the buſineſs with a view to the detection of the thieves. In conſequence of which the ſervant, with the conſent of his maſter, agreed with the priſoners to open the outer door to them, and let them into the*

In Eggington's caſe beforementioned, who was indicted for burglary and larceny, it appeared that the priſoners, intending to rob Mr. Boulton's manufactory at Soho, had applied to one Phillips his ſervant, who was employed there as a watchman, to aſſiſt them in the robbery. Phillips aſſented to the propoſal of the priſoners in the firſt inſtance; but immediately afterwards gave information to Mr. Boulton, the principal proprietor, and in whom the property of the goods taken (together with other perſons his partners) was laid; *telling him what was intended, and the manner and time the priſoners were to come; that they were to go into the counting-houſe, and that he was to open the door into the front yard for them.* In return, Mr. Boulton told him *to carry on the buſineſs*; that he (Boulton) would *bear him harmleſs*; *and Mr. Boulton alſo conſented to his opening the door leading to the front yard, and to his being with the priſoners the whole time.* In conſequence of this information, Mr. Boulton removed from the counting-houſe every thing but 150 guineas and ſome

ſilver

ſilver ingots, which he marked to furniſh evidence againſt the priſoners; and lay in wait to take them, when they ſhould have accompliſhed their purpoſe. On the 23d of December, about one o'clock in the morning, the priſoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard, and from thence they and Phillips went through a door which was left open, up a ſtaircaſe in the centre building leading to the counting-houſe and rooms where the plated buſineſs was carried on: this door the priſoners bolted, and then broke open the counting-houſe, which was locked, and the deſks, which were alſo locked; and took from thence the ingots of ſilver and guineas. They then went to the ſtory above into a room, where the plated buſineſs was carried on, and broke the door open and took from thence a quantity of ſilver, and returned down ſtairs; when one of them unbolted the door at the bottom of the ſtairs which had been bolted on their going in, and went into the middle yard; where all (except one who eſcaped), were taken by the perſons placed to watch them. On this caſe two points were made for the priſoners; Firſt, that no felony was proved, as the whole was done with the knowledge and aſſent of Mr. Boulton, and that the acts of Phillips were his acts. Secondly, That if the facts proved amounted to a felony, it was but a ſimple larceny, as the building broke into was not the dwelling-houſe of any of the perſons whoſe houſe it was charged to be; and that there was no breaking, the door being left open. After conviction, the caſe was argued before all the Judges in the Exchequer Chamber; and, for the reaſons before ſtated, all the Judges agreed that the priſoners were not guilty of the burglary.

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houſe, where they broke open inner apartments and took the goods. Held larceny by a majority; one doubting, becauſe of the owner's aſſent and partial encouragement to the felony by means of his ſervant.

May 9th, 1801, ante, 496.

But with reſpect to the larceny, the majority thought there was no aſſent in Boulton: that his object being to detect the priſoners, he only gave them a greater facility to commit the larceny than they otherwiſe might have had: and that this could no more be conſidered as an aſſent, than if a man, knowing of the intent of thieves to break into his houſe, were not to ſecure it with the uſual number of bolts. That there was no diſtinguiſhing between the degrees of facility

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cility a thief might have given to him. That it could only be conſidered as an apparent aſſent. That Boulton never meant that the priſoners ſhould take away his property. And the circumſtance of the deſign originating with the priſoners, and Boulton's taking no ſtep to facilitate or induce the offence until after it had been thought of and reſolved on by them, formed with ſome of the Judges a very conſiderable ingredient in the caſe; and differed it much from what it might have been if Boulton had employed his ſervant to ſuggeſt it originally to the priſoners. Lawrence J. doubted whether it could be ſaid to be done invito domino, where the owner had directed his ſervant to carry on the buſineſs; to open the door; and meant that the priſoners ſhould be encouraged by the preſence of that ſervant; and that by his aſſiſtance they ſhould take the goods, ſo as to make a complete felony; though he did not mean that they ſhould carry them away. Finally, the priſoners were recommended to mercy on condition of being tranſported for ſeven years, the puniſhment they would have been liable to for the larceny. The deciſion in the above caſe is conſonant to the rule laid down in the civil law under ſimilar circumſtances.

Vide Juſt. Inſt. lib. 4. tit. 1. ſ. 8.

This ſort of defence, that the property was delivered by and with the conſent of the owner, has been not unfrequently ſet up in the caſe of robbery from the perſon, where pretended gifts have been extorted by threats of accuſing perſons of a certain odious crime. This and other inſtances of extorted conceſſions will hereafter be conſidered more fully under the appropriate diviſion of robbery from the perſon.

§ 102. *Diſtinction as to parting with the property or only the poſſeſſion of the thing delivered.*

The next inquiry is whether the owner, in making the delivery, intended to part with the *property*, or only with the *poſſeſſion* of the thing delivered. For if he parted with the *property* to the priſoner, by whatever fraudulent means he was induced to give the credit, it cannot be felony. But if the bare *poſſeſſion* only were delivered, then it is material to inquire whether the delivery were by way of charge, or as a general bailment, or for ſome ſpecial purpoſe. And each of theſe ſeveral ſorts of delivery will furniſh matter of diſtinct conſideration, the blending whereof together has given riſe

riſe to moſt of the doubts which have occurred on this ſubject. Ch. XVI. § 102. *Owner parting with property or poſſeſſion.*

The firſt branch of inquiry relates to thoſe caſes where perſons, led by fallacious appearance held out to them by a priſoner or thoſe with whom he was acting in concert, have given him credit for goods which without ſuch fraud he would never have obtained, and of which he previouſly intended to cheat the owners. This, where the property is intended to be transferred to the identical perſon to or for whom the delivery is made, does in no caſe amount to larceny: becauſe however fraudulent the intent may be, yet there is no treſpaſs in the taking, without which there can be no larceny or robbery. And where ſuch credit is obtained by means of falſe tokens or pretences, the legiſlature have ſupplied a particular remedy.

§ 103. *Acquiring the property by fraudulent appearances.*

Vide 1 Hale, 506.

Vide poſt. tit. Cheats.

This diſtinction between parting with the *property* or the *poſſeſſion* has been diſcuſſed and ſettled in a variety of caſes which will be mentioned. But to purſue the train of the ſubject with more regularity than a chronological arrangement of them would admit of, I ſhall begin with ſome of a recent date. Juſtin Harvey was indicted for horſe ſtealing: and it appeared in evidence that the priſoner met the proſecutor at a fair with the horſe which he had brought there for the purpoſe of ſelling it; and being known to him, propoſed to him to become the purchaſer. They walked together in the fair; and upon a view of the horſe, the proſecutor told the priſoner he ſhould have it for *L.* 8; and calling his ſervant, ordered him to deliver it to the priſoner; who immediately mounted the horſe, telling the proſecutor that he would return immediately and pay him: the proſecutor replied *very well:* and the priſoner rode away with the horſe and never returned. Gould J. ordered an acquittal; for here was a complete contract of ſale and delivery: the property as well as the poſſeſſion was entirely parted with.

Rex v. Harvey, Chelmsford Aſſ. 1787, cor. Gould J. 2 Leach, 523. *Obtaining delivery of a horſe ſold on promiſe to return immediately and pay for it; and riding off and not returning; no felony.*

Nicholſon and others were indicted for ſtealing two bank poſt-bills, the one of 20l., the other of 15l., and ſeven guineas, the property of William Cartwright. It appeared that priſoner Nicholſon introduced himſelf to the proſecutor without any previous acquaintance, at his apartments in the Charter-

R. v. Nicholſon, Jones, and Chappel, O. B. Seſſ. bef. Hil. 1794, cor. Macdonald C. B. MS. Buller J. and MS. Jud. (S. C. 2 Leach, 698.)

Ch. XVI. § 103. *Property or poſſeſſion paſſing by delivery of money won at play by fraud.*

Several ſharpers inveigle one to bet with them; and after ſuffering him to win at firſt contrive to ſtrip him of a large ſum on the event of a bet; which the jury find to be a preconcerted ſcheme to get his money: Yet as he parted with his property under the idea that it had been fairly won; held no felonious taking.

Charter-houſe, under pretence of inquiring what the rules of the charity were. He diſcovered that the proſecutor had ſome money, by his deſk having been opened during the converſation. Nicholſon deſired him to walk with him, and they went to a public houſe, having been joined by the priſoner Chappel. Some liquor was called for, when the other priſoner Jones came into the room, and ſaid he had come from Coventry to receive 1400 l. and produced a quantity of notes. Chappel ſaid to him, "I ſuppoſe that you think that "no one has any money but you." Jones anſwered, "I'll "lay 10 l. that neither of you ſhew 40 l. in three hours." They all went out, Nicholſon and Chappel ſaying they ſhould go to the Spotted Horſe; and both aſked the proſecutor if he could ſhew 40 l. He anſwered, he believed he could. Nicholſon accompanied the proſecutor to his room at the Charter-houſe, where the proſecutor took out of his deſk the two poſt-bills in queſtion, and five guineas. Nicholſon then adviſed him to take a guinea or two more, and he accordingly took two more. They then went to the Spotted Horſe, where Jones and Chappel were in a back room. Jones put down a 10 l. note for each who could ſhew 40 l. The proſecutor ſhewed his 40 l. by laying down the notes and guineas; but did not recollect whether he took up the 10 l. given to him. Jones then wrote four letters with chalk on the table, and going to the end of the room turned his back, and ſaid that he would bet them a guinea a-piece that he would name another letter which ſhould be made and a baſon put over it. Another letter was made, and covered with the baſon. Jones gueſſed wrong, and the others won a guinea each. Chappel and Nicholſon then ſaid, we may as well have ſome of Jones's money, for he is ſure to loſe, and we may as well make it more for we are ſure to win. The proſecutor ſtaked his two notes and the ſeven guineas. Jones then gueſſed right: and the notes lying on the table, Jones ſwept them all off, and went to the door of the room; the other priſoners ſitting ſtill. A conſtable immediately came in and apprehended the priſoners. The proſecutor ſaid, on croſs examination, that he did not know whether the 10 l. note given to him by Jones on ſhewing 40 l. were a real one or not. That having won the firſt wager by gueſſing the letter, if the

Ch. XVI. § 103. *Property or poſſeſſion paſſing by delivery of money won at play by fraud.*

the matter had ended there, he ſhould have kept the guinea. That he did not object to Jones taking his 40 l. when he loſt, and would have taken the 40 l. if he had won. The officers who had taken the priſoners, having ſearched them, found a great many pieces of thin paper upon them, having numbers, ſuch as, 100, 50, &c. ſomething in the manner of bank notes, the bodies of the notes being advertiſements of different kinds. No good notes were found upon them, but about eight guineas in caſh, a ſum inſufficient to have paid 40 l. if Jones had loſt the wager. A lump of paper was put into the proſecutor's hands by Jones when the officers came in, which was afterwards found to contain the two genuine poſt-bills mentioned in the indictment. It was contended on the part of the priſoners that this was a mere gaming tranſaction, or at moſt only a cheat, and not a felony. And a doubt being entertained on the bench as to the latter point, it was left to the jury to conſider, whether this were a gaming tranſaction, or whether it were a preconcerted ſcheme by the priſoners, or any of them, to get from the proſecutor the poſt-bills and caſh. The jury were of opinion that it was a preconcerted ſcheme in all of them for that purpoſe; and found them guilty. But in Hilary term 1794 all the Judges held the conviction wrong: for here the *property* was parted with by the proſecutor.

R. v. Parks, O. B Seſſ. bef. Hil. term 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 703). *The priſoner, with intent to defraud, orders one to ſend him goods to be paid for on delivery, and afterwards gives the ſervant who brings them bills in payment which are good for no thing. Held no larceny; for the owner's ſervant, (though his maſter did not intend to give the priſoner credit)*

At the ſame ſeſſions John Parks was indicted for ſtealing a piece of ſilk of the value of 10 l., the property of Thomas Wilſon. It was proved that the priſoner had called at Wilſon's warehouſe, and having looked at ſeveral pieces of ſilk, ſelected the one in queſtion, and ſaid that his name was John Williams; that he lived at No. 6, Arabella-row, Pimlico; and that if Wilſon would ſend it that evening he would pay him for it. The proſecutor accordingly ſent his ſhopman with it, and the next morning had two notes given to him by the ſhopman: who proved that as he was taking the goods according to the direction, he met the priſoner between Hyde-park and the row; that the latter went with and took him into a room at No. 6, Arabella-row, where he delivered a bill of parcels to the priſoner; who examined it, and gave him two bills drawn by Frith and Co. at Bradford on Taylor and Co. in London. The bills were for 10 l. each, but the

Ch. XVI. § 103. *Property or poſſeſſion paſſing by delivery on a ſale procured by fraud.*

goods only came to 12 l. 10 s. The ſhopman ſaid that he had not caſh to give the balance; to which the priſoner anſwered, that he wanted more goods and ſhould call the following day: but he ſaw no more of him till he was apprehended. The notes having been carried to Taylor and Co. were declared by them to be good for nothing; and that they had no correſpondent at Bradford. It was further proved, that before the goods were ſent from Wilſon's, they were entered in a memorandum book, and the priſoner made debtor for them; and that they were carried into the ledger about a month after in the ordinary courſe; and that the priſoner ſtill ſtood debited there for the amount. That this was Wilſon's practice in all caſes where goods were not paid for immediately. A doubt ariſing whether this were not a ſale, and ſuch a delivery as would change the property, the Chief Baron left it to the jury to conſider whether there were from the beginning a premeditated plan on the part of the priſoner to obtain the goods, without paying value for them? and whether this were a ſale by Wilſon, and a delivery of the goods with intent to part with the property; he having received bad bills in payment through the medium of his ſervant? The jury ſaid that they were of opinion that the priſoner from the beginning intended to defraud Mr. Wilſon; and that it was not Wilſon's intention to give the priſoner credit; and found him guilty. But in Hilary term 1794 the Judges were of opinion that the conviction was wrong; the *property* as well as the poſſeſſion having been parted with upon receiving that which was accepted as payment by the proſecutor's ſervant, though the bills afterwards turned out to be of no value.

parted with the property by accepting ſuch payment as was offered.

§ 104. *No difference where delivery from the owner upon credit obtained under another's name.*

It makes no difference in theſe caſes, that the credit was obtained by fraudulently uſing another's name, to whom in truth the credit was intended to be given, if the delivery of the goods were made by the owner or any other having the diſpoſing power for that purpoſe.

Coleman's caſe, O B. June 1785, Seſſ. Pap. No. 648, (1 Leach, 339. n. S. C.) *Obtaining ſilver on pretence of ſending half guinea preſently in exchange no felony.*

In the caſe of Catherine Coleman, it appeared that ſhe went to a tradeſman's houſe, and ſaid ſhe came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of ſilver, and that ſhe would

would ſend the half guinea preſently. The priſoner obtained the ſilver and never returned: and this was holden no felony. This was in truth a *loan* of the ſilver, upon the faith that the amount would be repaid at another time. It was money obtained on a falſe pretence. And the ſame determination has been made in ſimilar caſes at the Old Bailey.

Ch. XVI. § 104. *Property or poſſeſſion paſſing by delivery upon a loan obtained by fraud.*

James William Atkinſon was indicted for ſtealing two bank notes, the property of William Dunn, againſt the ſtatute. It appeared that the priſoner ſent one Dale (to whom he was unknown) with a letter directed to Dunn; bidding Dale to tell Dunn that he brought the letter from Mr. Broad; and to bring the anſwer to him (the priſoner) in the next ſtreet, where he would wait for him. Dale accordingly carried to Dunn the letter, which was written in the name of Broad, a friend of Dunn's, ſoliciting the loan of 3 l. for a few days; and deſiring that the money might be incloſed back in the letter immediately. Dunn thereupon ſent the bank notes in queſtion, incloſed in a letter directed to Broad, and delivered the ſame to Dale, who delivered them to the priſoner as he was firſt ordered. The letter turned out to be an impoſition. It was objected at the trial that this was no felony, becauſe the abſolute dominion of the property was parted with by the owner, though induced thereto by means of a falſe and fraudulent pretence. And on reference to the Judges after conviction, all preſent held that it was no felony; on the ground that the property was intended to paſs by the delivery of the owner; and that this caſe came within the ſtat. 33 H. 8. c. 1. againſt falſe tokens, which particularly ſpeaks of counterfeit *letters*. It was obſerved in the courſe of the debate, that this differed from Noah Pearce's caſe; for there the property did not paſs; the poſt-maſter having no property in the mail bag to part with; but here the proſecutor parted with his property when he lent it as a loan.

Atkinſon's caſe, O.B. Sept. 1799, cor. Le Blanc J. MS. Jud. *One writing a letter in the name of another to a third perſon to borrow money, which he obtains by that fraud, is only guilty of a miſdemeanor. Vide* poſt. tit. *Cheats.*

Mich. Term 1799, (abſent Buller J.)

Ante, f. 39.

On the ſame ground the above caſe is alſo diſtinguiſhable from that of Wilkins, which happened prior to it in point of time, but does not appear to have been adverted to. John Wilkins was convicted of ſtealing a quantity of ſtockings, the property of William Waite. It appeared in evidence that the priſoner ſhortly before had met Mr. Waite's apprentice on Ludgate-Hill, and aſked him if he were going to

Wilkins's caſe, O. B. Ap 1789, MS. Buller J. and MS. Jud. *The owner ſends goods by his ſervant to be delivered to* A.; *but* B. *fraudulently*

Ch. XVI. § 104. *Property or poſſeſſion paſſing by delivery from one who had no diſpoſing power.*

Mr. Heath, a hoſier in Milk-ſtreet. The apprentice had at that time two parcels under his arm directed to Mr. Heath, containing the articles in queſtion; and having anſwered in the affirmative, the priſoner told him that he knew his maſter, and owed him for thoſe parcels; and he then gave the lad a parcel, which was afterwards found to contain two diſh-clouts of no value, telling him to take it to his maſter directly, that his maſter might forward it to a Mr. Brown: and the priſoner, with the approbation and conſent of the apprentice, took from him the two parcels containing the ſtockings. The boy then left the priſoner. But a ſuſpicion ariſing ſoon in his mind, he walked after him, overtook him, and aſked him if he was Mr. Heath; which the priſoner anſwering in the affirmative, the boy was ſatisfied, and left the priſoner with the goods, which were never afterwards recovered. On this evidence, together with the fact that the priſoner was not Mr. Heath, the jury found the priſoner guilty, and that he had gotten poſſeſſion of the goods in the manner above deſcribed, and converted them wrongfully to his own uſe. But the Recorder, doubting whether the crime amounted to felony, referred the caſe to the Judges, all of whom preſent in Hilary term 1790 were of opinion that the conviction was proper. In the printed report of this caſe, Mr. Juſtice Gould, in giving the reaſons of their judgment, lays down theſe rules as clearly ſettled; that the poſſeſſion of perſonal chattels follows the right of property in them; that the poſſeſſion of the ſervant was the poſſeſſion of the maſter, which could not be deveſted by a tortious taking from the ſervant; that this rule held in all caſes where ſervants had not the abſolute dominion over the property, but were only entruſted with the care or cuſtody of it for a particular purpoſe.

procures the delivery to himſelf by pretending to be A.: Held felony.

(Abſent Perryn B. and Heath J.) 2 Leach, 586.

Ante, 671.

The above reaſoning points out the difference between that and Parks' caſe before mentioned, where the ſervant was entruſted with the power of diſpoſing of the goods to the priſoner.

§ 105. *Delivery before ſale complete.*

It frequently happens in theſe caſes, that the priſoner goes off with the goods before any ſale is actually concluded; or where there has only been a delivery upon a condition, by way of pledge, or the like, to have the goods returned again.

In

In these cases the property not being parted with by the owner, if the prisoner obtain the possession by fraud, with intent to steal the goods, it amounts to felony. Sharpless and Greatrix were convicted of stealing six pair of silk stockings of Owen Hudson; on which a case was reserved for the consideration of the Judges; which stated that Greatrix in the character of servant to Sharpless had left a note at Hudson's shop, who was a hosier, desiring that he would send an assortment of silk stockings to his master's lodgings, at the Red Lamp in Queen-square. The hosier having taken them according to direction, Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing gown, his hair just dressed, and an unusual quantity of powder over his face. Having looked at some of the stockings, and asked the price, which he was told was 14 s. a pair, he desired Mr. Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Hudson hung the six pair of stockings which Sharpless had looked out on the back of the chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Hudson's absence the prisoners decamped with the goods, which were proved to have been afterwards pawned by one of them. The Judges were of opinion that the conviction was right; for the whole of the prisoners' conduct manifested a preconceived design to obtain a tortious possession of the property: and the verdict of the jury imported that in their belief the evil intention preceded the possession of the goods by them. But that even independent of that, there did not appear a sufficient delivery to change the property.

Ch. XVI § 105. *Property or possession passing by delivery on sale incomplete.*

R. v. Sharpless and Greatrix, O. B. May 1772, cor. Gould J. and Adams B. 1 Leach, 108. *Goods examined by one pretending to become a purchaser, and set apart from the rest, but not actually bargained for or delivered, were afterwards carried off by him while the owner was sent away on pretence of getting more; held felony; the property not being transferred.*

§ 106. *On agreement to discount.*

At the O. B. J. H. Aickles was tried for stealing a bill of exchange of 100l. value, the property of S. Edwards. The prosecutor had applied to several persons to get the bill discounted, which was drawn by himself: and some days afterwards the prisoner, a total stranger to him, left this address at Edwards's lodgings. "Mr. H. No. 21, Great Pulteney Street, from 6 to 7 in the evening, or from 11 to 12 in the morning." In consequence of which Edwards called on the prisoner there, who informed him that he was in the

R. v. Aickles, O. B. Jan. 1784, cor. Ashhurst and Heath Js. 1 Leach, 330. *Where upon an agreement with the prisoner to discount a bill of exchange it was delivered into his hands to satisfy*

Ch. XVI. §106. *Property or poſſeſſion paſſing by delivery, or diſcounting incomplete.*

discounting line, and would discount bills for him at the usual premium of $2\frac{1}{2}$ per cent. agency, provided they were accepted by responsible persons. In three weeks time the prosecutor sent one Croxall, his clerk, to the prisoner to know whether he would discount the bill in question, which was accepted by Mr. R. Wells of Cornhill, to whom he referred him. The prisoner returned with Croxall to Wells' house, where he agreed with Edwards to discount the bill for $2\frac{1}{2}$ per cent. agency, exclusive of the legal interest for two months. Edwards then delivered the bill into the hands of the prisoner, and referred him to Wells to satisfy himself that it was a genuine acceptance; which Wells affirming, the prisoner, addressing himself to Edwards, said, that if he would go with him to Pulteney Street, he would give him the cash. Edwards replied that it was not convenient for him to go; but that Croxall should attend the prisoner, *and pay him the* 25*s. agency, and the discount on receiving the* 100*l.* On their departure Edwards whispered his clerk not to leave the prisoner without receiving the money, nor to lose sight of him; promising to follow them in half an hour. Croxall went with the prisoner to his lodgings in Pulteney Street, where the prisoner shewed him a room, and desired him to wait while he fetched the money, saying it was only about three streets off, and he should be back again in a quarter of an hour. Croxall, however, followed him down Pulteney Street, but in turning the corner of an adjoining street, he missed him. He afterwards walked up and down the street for a long time, but without success: and he and Edwards, who joined him, returned to the prisoner's lodgings, where they waited three days and nights for him in vain. Shortly after, however, the prisoner was apprehended at another place, when he expressed his sorrow, and promised to return the bill. It was proved that the bill had been seen a few days before the trial in a state of negociation in the hands of a Mr. Smith; and that a subpœna duces tecum had been served upon him; but he did not appear, nor was the bill produced in evidence. It was therefore objected, First, That the bill itself ought to have been produced in evidence. Secondly, That the facts, admitting them to be well proved, did not amount to felony. The Court left the case with the

himself in the first instance of the goodness of the bill, but the owner not intending to trust him with it without receiving the money, directed his clerk to follow the prisoner to the place where the money was to be paid, and not to leave him without receiving it: held that the prisoner afterwards contriving to run away with the bill without payment was guilty of larceny, the property not being transferred before payment of the money.

jury to consider; first, Whether they thought the prisoner had a preconcerted design to get the note into his possession with an intent to steal it? And next, Whether the prosecutor intended to part with the note to the prisoner without having the money paid first? The jury found the affirmative of the first, and the negative of the second question; and concluded, that the prisoner was guilty. And upon reference to all the Judges, they held the conviction proper against both the objections.

Ch. XVI. § 106. *Property or possession passing by delivery and discounting incomplete.*

It may not be improper to observe upon the above case, that from the whole transaction it appeared that Edwards never gave credit to the prisoner. It is true he put the bill into his hand after they had agreed upon the terms on which it was to be discounted, that by shewing it to Wells he might satisfy himself that it was a genuine acceptance. But besides that this was an equivocal act of delivery in itself, it seems sufficiently explained by the subsequent acts: for Edwards, or his clerk by his direction, continued with the prisoner until he ran away, for the very reason, because they would not trust him with the bill. In other words, Edwards would not give the prisoner credit for the property of the bill; and that being the case, he could no more be said to have parted with the property therein, nor as it seems with the legal possession, than a tradesman may be said to do, who being desired by a person coming into his shop to let him see some cravats, put the goods into his hands; and being asked the price, which he mentioned, the thief offered less, and ran away with the goods without paying for them. This, says Raymond, was felony: First, Because he should be said to have taken these goods with a felonious intent; for the act subsequent, viz. his running away with them, explained his intent precedent. Secondly, Because, although the goods were delivered, yet they were not out of the owner's possession by the delivery till the property was altered by the perfection of the contract; which was but inchoate, and never perfected between the parties: and when the prisoner ran away with the goods, it was as if he had taken them up lying in the shop, and had ran away with them. It would bring great contempt on the justice of the nation, as Hawkins somewhere observes, if its laws could be evaded by such tricks and contrivances as these. But if

Ante, 677. Post. f. 112. *Vide* Abraham Chiffer's case, T. Ray. 275.

Post. f. 110.

Ch. XVI. § 106. *Property or poſſeſſion paſſing by delivery on diſcounting incomplete.*

credit be given for the property for ever ſo ſhort a time, no felony can be committed by converting it.

§ 107. *By way of pledge or ſecurity.* Patch's caſe, O.B. Feb. 1782, cor. Gould J. Perryn B. and Buller J. MS. Buller J. & 2 MS. Sum. 227. (S. C. 1 Leach, 273.) *Pretending to find a jewel, in which the proſecutor as preſent at the time was to ſhare, and inducing him to take charge of it, and to depoſit with the finder his watch, &c. until the latter ſhould redeem the jewel by paying a certain ſum of money; and this done with intent to ſteal the watch, &c.: Held larceny.*

So where the delivery is by way of pledge or ſecurity, the property in the thing pledged remains in the owner, and therefore larceny may be committed of it, if ſuch delivery were obtained fraudulently and with intent to ſteal.

John Patch was indicted for ſtealing a ſilver watch, gold ſeal, &c. and 7s. the property of J. Bumſtead. The priſoner and two others joined Bumſtead in a ſtreet in London; and after walking a little way with him, one of them ſtooped down and picked up a purſe which contained a ring, and a receipt for 147l., purporting to be the receipt of a jeweller for a rich brilliant diamond ring. The priſoner propoſed that they ſhould go into a public houſe, which they accordingly did, to conſider in what manner the prize ſhould be divided amongſt them. After various propoſals the priſoner at length aſked the proſecutor if it would be agreeable to him to take the ring into his own poſſeſſion, and to depoſit his money and watch, which he had before interrogated him about, as a ſecurity to return it upon receiving his portion of its value. The proſecutor aſſented, and ſigned a written agreement, dictated by the priſoner; that when the priſoner or either of the two other men returned the watch and money and 70l., he would re-deliver to them the purſe and the ring." The proſecutor accordingly laid the watch and money mentioned in the indictment on the table, and received the ring. The priſoner beckoned the proſecutor out of the room upon pretence of ſpeaking to him in private, and in the mean time the other two men went off with the property. Their abrupt departure alarmed the proſecutor, but the priſoner told him not to be uneaſy, for he knew the two men very well, and would take care that he ſhould have his watch and money again; and when the priſoner was apprehended, he wanted to make it up. The ring was valued at 10s. It was objected that this amounted only to a fraud. But the Court, upon the authority of Pear's caſe, referred it to the jury to conſider, Whether the whole tranſaction were not a preconcerted ſcheme feloniouſly to obtain the proſecutor's property? and Gould J. who tried the priſoner, left it to the jury,

Poſt. 687.

Whether

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Whether the priſoner and the other two men were not all in concert together to procure by ſuch a pretext any man's property whom they might meet, and to embezzle it; which in plain words was to ſteal it? The jury found the priſoner guilty, and he was ſent to the Thames for three years. The opinions of the three Judges who preſided at the trial were founded on this, that the poſſeſſion was obtained by fraud, and the property not altered; for the proſecutor was to have it again. And therefore it was not like the caſe of goods ſold on credit, where the buyer means immediately to convert them into money, and is not able nor intends to pay for them; for there the buyer gets the abſolute property by the act and conſent of the owner.

Moore's caſe, O. B. Ap. 1784, MS. Gould and Buller Js. and 2 MS. Sum. 228. (S. C. 1 Leach, 354.) *Inducing one to deliver 20 guineas and 4 doubloons by way of pledge for the return of a counterfeit jewel pretended to be found, and of which the party was to have half the value on his returning, it and receiving from the priſoner the 20 guineas, &c. again, and this done with intent to ſteal the money, &c. held larceny.*

The diſtinction, between parting with the *property* or with the *poſſeſſion* only, was very much conſidered in another caſe of one Humphrey Moore, who was indicted for ſtealing 20 guineas and four doubloons of John Field. A ſtranger joined company with the proſecutor in the ſtreet, and ſoon after picked up a purſe containing a ring and a receipt for 210 l. as for a brilliant diamond ring. He perſuaded the proſecutor to go into a public houſe with him, telling him he was entitled to half; and while he was looking at the ring there, the priſoner entered the room, inquired into the matter, and offered to ſettle it between them. The ſtranger ſaid he had bills to a large amount due the next day, but no money about him. Moore then inquired of the proſecutor what money he had got, who anſwered 40l. or 50l. at his lodgings at Chelſea. Moore thereupon propoſed going there, which they did; and after getting the money, they went to a public houſe in the neighbourhood, where the proſecutor put down 20 guineas and four doubloons; which the ſtranger in Moore's preſence took up and carried away, leaving the ring with the proſecutor; and having firſt appointed to meet him the next day, when he was to return the 20 guineas and four doubloons, and give the proſecutor 100 l. for his ſhare of the ring, which was then to be reſtored to him. Moore was alſo appointed to be there; and the proſecutor and the ſtranger were to give him a guinea each for his trouble. The priſoner and the ſtranger went away together, and the proſecutor ſaw no more of them either at the place appointed

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or elſewhere till the priſoner was taken up. The ring was of ſmall value. On theſe facts the jury were of opinion that the priſoner was confederated with the ſtranger, for the purpoſe of obtaining money on the pretence of ſharing the value of the ring: that in the manner and by the means above ſtated he aided the ſtranger to obtain the money of the proſecutor: and they found him guilty, ſubject to the opinion of the Court, Whether the offence amounted to felony? In November term 1784 all the Judges (except Lord Mansfield) met to conſider this caſe; and all of them, except Lord Loughborough and Lord C. B. Skynner, held the priſoner guilty. The majority thought that the money and the doubloons were delivered as a pledge, and not as a loan: ſo that though the poſſeſſion were parted with, the property was not; more eſpecially as to the doubloons, which the proſecutor clearly underſtood were to be returned the next day in ſpecie. The priſoner therefore having obtained them with a fraudulent intent to apply them to his own uſe, it was felony from the intention with which he gained the poſſeſſion: and he and his companion acting in concert together were equally guilty. The other two Judges differed on the fact, that the proſecutor had parted with the *property*. They thought the doubloons were to be conſidered as money; and that the whole was a loan on the ſecurity of the ring. And that when money was delivered by a man on ſuch an occaſion it was not in his contemplation to have the ſame identical money back again. But they admitted the rule as laid down by the other Judges from the caſes of R. v. Patch, Rex v. Pears, and other caſes which were there cited.

Watſon's caſe, O. B. Dec. 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 730.) *Pretending to find a valuable jewel, and offering to go halves with another, and on that pretence obtaining from her in her own houſe notes of* 100*l. value, which were to be depoſited in the*

John Watſon was convicted of ſtealing ſeveral bank notes, value 100*l.* in the dwelling-houſe of John Smith, the ſame being the property of the ſaid J. S., and the money then due, &c. againſt the ſtatute, &c. The proſecutor's wife proved that as ſhe was going along the ſtreet ſhe ſaw the priſoner ſtoop down and pick up a ſmall parcel. He ſaid he had got a prize. She cried "Halves," and ſaid it was uſual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the preſence of another man (who appeared to be an accomplice of the priſoner's,) and found in it a locket with a large ſtone,

and

and a paper purporting to be the receipt of a jeweller for 250 l. for a diamond locket. The prisoner said his name was Smith, that he was the captain of a ship, and that he would go to a friend's house, where his cargo was, and bring 100 l. towards paying the witness her share. He was accordingly absent about fifteen minutes, and returned saying that his friend was not at home. After making another pretence to go to the King's jeweller in Bond-street, which the prisoner at last evaded, they all proceeded to the witness's house in Mortimer-street, which they entered; the prisoner having first inquired who was at home, and been informed that only the witness's daughter was there. The witness then got 100 l. in bank notes, and laid them on the table. It had been before agreed between them, that the locket should be left in her custody, and that she should *deposit* 100 l. in the prisoner's hands *as a security* to return him the locket the next morning; at which time *she was to receive from him half the value of the locket*, as mentioned in the receipt found; *and she was to have the* 100 *l. deposited in the prisoner's hands as such security as aforesaid returned back*. The prisoners took up the bank notes laid on the table, said they were right, and that he would call the next morning and settle the whole; and after delivering up the locket, went off with the notes, and never returned again. The locket was of the trifling value of 5 s. 6 d. The prisoner was convicted of the simple felony in stealing the notes; but a case was reserved for the opinion of the Judges, upon an objection taken that this was only a fraud and not a felony. In Hilary term 1795 all the Judges held the conviction proper for the simple felony; but not for the stealing in the dwelling-house, (as it was at first supposed that the verdict had been taken.) For they thought, as to the capital part of the charge, that as the notes were in the possession of the prosecutrix, and derived no protection from the house, the case did not fall within the statute 12 Ann. c. 7.

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prisoner's hands till the next day as a security for the jewel which was to be left in her custody then, and returned to the prisoner upon his returning back the deposit and paying the prosecutrix 125 l. *half of the supposed value of the jewel, which was a counterfeit; amounts to felony of the notes so received; but not capital, as for a larceny in the dwelling-house of more than* 40 s. *the notes being in the possession of the prosecutrix and deriving no protection from being in the house.*

§ 108. *Different sorts of possession.*

Where it is out of dispute that the *property* remains in the original owner, and the only question is, Whether he did not so far part with the *possession* of the thing taken as to exclude the idea of any trespass in the taker, without which these

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these offences cannot be committed; it is material to examine in what manner such possession was in fact parted with; whether by way of charge, general bailment, or delivery for a special purpose. For I think it may now be laid down as general rules; First, That where notwithstanding a delivery by the owner in fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no such delivery had been made. Secondly, That where by the delivery a special property, and consequently a legal possession, apart from any felonious intent, would be transferred; there, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired; then also the taking amounts to larceny. Thirdly, That even where there is no evidence of a previous felonious intent in so obtaining the property, but it is acquired upon a privity of contract, still larceny may be committed after any act done to determine such privity of contract.

General rules as to delivery by way of charge, general bailment, or for a special purpose.

§ 109. *Possession by way of charge, or special use.* Ante, f. 14.

If the person to whom goods are delivered has but the bare charge or custody of them, the legal possession remains in the owner, and the other may commit larceny by a fraudulent conversion of them to his own use. This rule I have before shewn to hold most expressly in the case of servants entrusted with the care of goods in the possession of their masters. The only doubt which had any foundation in respect to such persons was where the master had no previous possession of the property distinct from the actual possession of the servant; but that difficulty has been removed by the stat. 39. Geo. 3. c. 85. before referred to. The same rule applies to him who has a bare special use of goods; as in the case of a guest in the owner's house: for none of these persons have properly speaking the possession. So if a weaver or silk throwster deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with intent to steal it, it is felony; for the entire property remains there only in the owner, and the possession of the workman is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he having the lawful possession of it had afterwards embezzled it, this would not be felony; because by the delivery he had a special property, and not a bare

2 MS. Sum. 230. 231, 3. Sum. 61. Owen, 52. Moore, 248. Crompt. 25. a. b. Bro. Coron. 160. MS. Tracy, 60. 1 Hale, 506. 667. 1 Hawk. ch. 33. f. 6. Poph. 84. Staundf. 25. Ante, 574.

O B. Oct. 1664. Kel. 35. Staundf. 25. a. 21 H. 7. 14.

Sum. 62. and MS. Sum. ut supra. 1 Hawk. ch. 33. f. 3.

bare charge; in the ſame manner as one who is entruſted with the care of a thing for another to keep for his uſe. Ch XVI. § 109. *Poſſeſſion by way of charge or uſe.*

If a merchant's or banker's clerk have acceſs to the money room upon ſpecial occaſions, or be ſent to the drawer for money for a ſpecial purpoſe; or if he be ſent to bring money generally out of the drawer; and at the time he take the opportunity of purloining money for his own uſe; he is as much guilty of felony as if he had no allowed acceſs to it whatever. This was not denied in Bazeley's caſe, and therefore needs not the aid of the ſtat. 39. Geo. 3. c. 85. Murray's caſe, O.B. Oct. 1784, cor. Ld. Loughborough, Seſſ. Pap. p. 1290. Ante, 571.

§ 110. *Poſſeſſion in owner's preſence for ſpecial purpoſe.*

It is worthy of conſideration whether the above-mentioned diſtinction, concerning the legal poſſeſſion remaining in the owner after a delivery in fact to another, do not extend to all caſes where the thing ſo delivered for a ſpecial purpoſe is intended to remain in the preſence of the owner. For in ſuch caſe the owner cannot be ſaid to give any credit to or repoſe confidence in the party in whoſe hands it is ſo in fact placed; and the thing being intended to be returned to the owner again, and reſumable by him every moment, his dominion over it is as perfect as before; and the perſon to whom it is ſo delivered has at moſt no more than a bare limited uſe or charge, and not the legal poſſeſſion of it. In this reſpect the caſe differs from a delivery upon a contract, whereby a ſpecial property is transferred, and conſequently a diſtinct poſſeſſion. This was one of the grounds on which Chiſſer's caſe was put by Raymond B. The goods which had been delivered there by the tradeſman to the cuſtomer to look at were not, ſays Raymond, out of the owner's poſſeſſion by the delivery (*a*), till the property was altered by the perfection of the contract. And this was mentioned by ſome of the Judges on the conference on Pear's caſe in 1779, as a matter proper for conſideration, Whether caſes of that deſcription, and amongſt others the caſe of the porter before Lord Holt, which will be mentioned preſently, were not governed by the principle, that the legal poſſeſſion ſtill remained in the owner of the goods notwithſtanding the delivery, he continuing preſent? though others thought that too refined, as ſetting up a legal fiction againſt the fact, which ought never to be done in Crompt. 25. a. H. 21 H. 7. 14. 1 Hale, 505. n. f. Ante, f. 106. Poſt. f. 112. Poſt. f. 115.

(*a*) Ld. C. B. Skynner was of the ſame opinion at the conference on Pear's caſe, in 1779.

criminal

Ch. XVI. § 110 *Poſſeſſion in owner's preſence.*

criminal caſes. Yet this fiction, ſuch as it is, is generally admitted to exiſt in the caſe of ſervants, and even in the caſe of other perſons having a ſpecial uſe of goods in the owner's houſe: the beſt reaſon for which, as it appears to me, is the preſumed preſence and ſuperintendence of the owner. And it does not ſeem more unreaſonable to conſider goods in the actual preſence of the owner, out of his houſe, as being in his legal poſſeſſion, though put into another's hands for a particular purpoſe, than if ſuch goods were delivered to another for the like purpoſe in the owner's houſe during his abſence. Upon this ground too Mr. Juſtice Burnet puts the caſe of the owner in a fair delivering his horſe to another to try his paces, and other caſes of the like ſort; where, if the party run away with the property, it is felony: for, ſays he, the owner only delivered it for trial and preſent uſe, and not by way of parting with the poſſeſſion: *for goods in the preſence of the owner are in law in his poſſeſſion ſtill, though he permit an uſe to another.* But indeed moſt of theſe caſes fall within the ſcope of another leſs diſputable principle; namely, that if the poſſeſſion be obtained with a felonious intent; in other words, with a fraudulent intent to convert the property to the taker's own uſe without account, though by the delivery of the owner, it amounts to felony.

Crompt. 25. a.

MS. Burnet, 61.

§ 111. *Upon a general or ſpecial bailment.*

This brings me to the conſideration of the two other ſpecies of poſſeſſion, upon a general or ſpecial bailment, which I ſhall conſider together; and herein there are three ſubjects of inquiry:

1. What is a bailment.
2. With what intent the thing is taken by the bailee.
3. By what acts the bailment is determined.

What a bailment.

1. Having already touched upon the difference between a charge and a bailment, it remains only to conſider what acts are ſufficient to amount to a delivery. A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A., with intent to ſteal them; this is felony: becauſe, ſays Lord Hale, the goods were not delivered to him, but taken by him. This may be ſo where by ſuch delivery of the key it is not in the contemplation of the parties to make

1 Hale, 505. Staundf. 25.

make a delivery of the goods contained in the room; as if it be delivered upon any other ſpecial occaſion. But if the key be delivered for the purpoſe of entruſting the party with the care of the goods, I cannot ſee but that it is as much a delivery of the goods themſelves, as if each article had been put by the owner into the hands of the party. And then, although the taking of ſuch goods out of the room with a fraudulent intent to convert them might ſtill be felony, yet it would be ſo on another ground; becauſe by the act of taking the goods with ſuch intent out of the room where they were intended to remain for ſafe cuſtody, the privity of the contract would be determined in the ſame manner as if they had been delivered in a box and taken out of it afterwards. Nor do I find any ground for making a diſtinction between a delivery of goods in criminal and in civil caſes; at leaſt no ſuch diſtinction appears to exiſt at common law.

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Vide Ellis v. Hunt. 3 T. Rep. 468.

§ 112. *Taking goods by delivery of owner with felonious intent.* Sum. 61. 1 Hale, 504. &c. 2 MS. Sum. 239.

2. Upon the ſecond point: It is peculiarly the province of the jury to determine with what intent any act is done; and therefore, though in general he who has a poſſeſſion of any thing on delivery by the owner cannot commit felony thereof; yet that muſt be underſtood, firſt, where the poſſeſſion is abſolutely changed by the delivery, which I have before conſidered; and next, which is the preſent object of inquiry, where ſuch poſſeſſion is not obtained by fraud, and with a felonious intent. For if, under all the circumſtances of the caſe, it be found that a party has taken goods from the owner, though by his delivery, with an intent to ſteal them, ſuch taking amounts to felony; it being granted that there is evidence to warrant ſuch a concluſion in point of fact. I cannot illuſtrate this ſubject better than by a full and accurate account of a caſe which was much diſcuſſed by the Judges. John Pear was indicted for ſtealing a black mare, the property of Samuel Finch. On the 2d July 1779 the priſoner hired the mare of Finch, who lived in London, for that day, in order to go to Sutton in Surry, and told him that he ſhould return at eight o'clock the ſame evening. Finch, before he let the priſoner the mare, inquired of him where he lived, and whether he were a houſekeeper: to which he anſwered, that he lived at No. 25 in King-ſtreet, and was only

Pear's caſe, O.B. Sept. 1779. MS. Buller J. (S. C. 1 Leach, 253.) *Having a horſe on pretence of taking a journey, but in truth with intent to ſteal it, and evidencing ſuch felonious intent by immediately ſelli-*

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

only a lodger. The prisoner not returning as he had promised, the prosecutor went the next day to inquire for him according to the direction he had given; but no such person was to be found. It turned out that the prisoner had in the afternoon of the same 2d of July sold the mare in Smithfield. In summing up this evidence to the jury, Mr. Justice Ashhurst, who tried the prisoner, told them, that if they were of opinion that the prisoner hired the mare with an intent of taking the journey mentioned, and afterwards changed that intention; then, as she was sold whilst the privity of contract subsisted, they ought to acquit the prisoner. But if they were of opinion that the journey was a mere pretence to get the mare into his possession, and that he hired her with an intention of stealing her; they ought to find him guilty: and he would save the point for the opinion of the Judges. The jury found the prisoner guilty. This case underwent a great deal of discussion: and the Judges delivered their opinion seriatim upon it, on the 4th February 1780, at Lord C. J. De Grey's house: and on the 22d of the same month Mr. Baron Perryn delivered their opinion at the O. B. as follows (*a*). (After stating the indictment, evidence, and finding of the jury as above stated,) This case has been maturely considered by all the Judges, and eleven (*b*) of them, who met for the purpose, delivered their opinions at large upon the subject: seven of them held the offence to be a clear felony; two of them were of opinion that it was not felony; and the other two entertained great doubts at the last; which doubts were founded upon two statutes which he should take notice of. Three out of the four dissenting Judges agreed with the seven, that by the principles of the common law this was felony. But the doubts and opinions of those four Judges were founded chiefly on the statutes 33 H. 8. and 30 G. 2. against obtaining goods by false tokens or false pretences. Two of the Judges thought that as the delivery of the mare was obtained from the owner by means of asserting that which was false, viz. that the prisoner

ing the horse as soon as the party obtained possession of it, is larceny.

Vide post. tit. Cheats.

(*a*) This judgment was settled and approved by several of the judges before it was delivered.

(*b*) Mr. Justice *Blackstone*, the other judge who was absent on account of illness, always held that it was felony.

wanted

wanted to go a journey which he never intended to take at all; and as the two ſtatutes before mentioned had made the offence of obtaining goods by falſe tokens or falſe pretences, puniſhable as a miſdemeanor only; and the ſtat. 33. H. 8. had diſtinguiſhed the caſe of obtaining goods by falſe tokens from the caſe of obtaining goods by ſtealth; they were bound by thoſe ſtatutes to ſay, that the priſoner's offence was not felony. One of them alſo held that this was not felony by the common law; becauſe there was no actual taking of the mare by the priſoner. But ten out of the eleven Judges held it to be clear that the offence would have been felony by the common law, if the ſtatutes had never exiſted: and ſeven of them held that it was not within or at all affected by the ſtatutes of H. 8. or G. 2. That larceny was defined by Lord Coke to mean a felonious and fraudulent taking and carrying away of the goods of another. But it was ſettled by old authorities, that the taking need not be by force. If a carrier or porter received goods to carry from one place to another, and he opened the pack and ſold them; that was felony: yet in that caſe there was no taking by force, but on a delivery by the owner. That the reaſon aſſigned for the determination in Kel. 82. was becauſe the opening and diſpoſing of them declared that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a deſign of ſtealing them. So if A. cheapened goods of B.'s and B. delivered them to A. to look at, and A. ran away with them; this was felony by the apparent intent of A. T. Ray. 276. Kel. 82. So if a horſe were upon ſale, and the owner let the thief mount him in order to try him, and the thief rode away with him, it was felony. Kel. 82. So in the caſe of one Tunnard, tried at the O. B. in October Seſſions 1729, who was indicted for ſtealing a brown mare of Henry Smith's: and upon the evidence it appeared, that Smith lived in the Iſle of Ely, and lent Tunnard the mare to ride three miles; but he, inſtead of riding three miles only, rode her up to London and ſold her: this was holden to be felony. And Lord C. J. Raymond, who tried the priſoner, left it to the jury to conſider, Whether Tunnard rode away with her with an intent to ſteal her? and the jury found him guilty. That here the ſame directions were given

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Poſt. f. 115.

Tunnard's caſe, O. B. 1729.

Denton J. and Hale B. aſſiſted. MS. *vide* poſt.

to

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to the jury by the learned Judge who tried the priſoner, and the jury had given the ſame verdict. That even in the caſe of burglary, which the law defined to be the breaking into a houſe in the night time with intent to commit felony, if a man procured the door of a houſe to be opened by fraud, and by that means entered into the houſe through the door-way without any actual breaking, it had been adjudged to be burglary. That in all theſe caſes the intention was the thing chiefly regarded, and fraud ſupplied the place of force. That what was the intention was a fact, which in every caſe muſt be left upon the evidence to the ſound judgment of a jury. And in this caſe the jury had found that at the time when the priſoner obtained the poſſeſſion of the mare, he intended to ſteal her. That the obtaining the poſſeſſion of the mare, and afterwards diſpoſing of her in the manner ſtated, was in the conſtruction of law ſuch a taking as would have made the priſoner liable to an action of treſpaſs at the ſuit of the owner, if he had not intended to ſteal her. For ſhe was delivered to the priſoner for a ſpecial purpoſe only, viz. to go to Sutton, which he never intended to do, but immediately ſold her. That in this light the caſe would be ſimilar to what was laid down by Lyttleton, ſ. 71, who ſays, "If I lend to one my ſheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have treſpaſs notwithſtanding the lending." That if in ſuch a caſe treſpaſs would have lain, there could be no doubt but that in this caſe, where the felonious intent at the time of obtaining the poſſeſſion was found by the jury, that it was felony by the common law. That ten of the Judges out of the eleven, therefore, were of opinion, that if a perſon obtained the delivery of a thing by fraud and falſehood, intending at the time that he ſo obtained the delivery to ſteal it; upon the principle of the common law and the adjudged caſes which had been mentioned, if the ſtatutes had not exiſted, his offence would be felony (*a*). That the next queſtion was, Whether this offence were within

(*a*) On the debate of this caſe, Aſhhurſt J. ſaid, "Wherever there is a real and bonâ fide contract and a delivery, and afterwards the goods are converted to the party's own uſe; that is not felony. But if there be no real and bonâ fide contract, if the underſtanding of the parties be not the ſame, the contract is a mere pretence, and the taking is a taking with intent to commit felony.

or

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or at all affected by the ſtatutes of H. 8. and Geo. 2. (*a*). Seven of the Judges were of opinion, that it was not. That the ſtat. of Hen. 8. was confined to the caſes of obtaining goods *in other men's names, by falſe tokens or counterfeit letters*, made in any other man's name. The ſtat. of Geo. 2. extended that law to all caſes where goods were obtained *by falſe pretences* of any kind. But both theſe ſtatutes were confined to caſes where credit was obtained in the name of a third perſon; and did not extend to caſes where a man, on his own account, got goods with an intention to ſteal them. That beſides, the ſeven Judges held that neither of thoſe ſtatutes were intended to mitigate the common law, or to make that a leſs offence which was a greater before. On the contrary, the Legiſlature, by thoſe ſtatutes, meant to inflict a ſeverer puniſhment in the caſes of fraud than the common law had done. That in many caſes it was extremely difficult, and ſometimes impoſſible to prove what the offender's original intention was. The circumſtances evidencing a felonious intent, or the contrary, were ſo various, that Hale (509) ſays it is impoſſible to preſcribe them: they muſt be left to the conſideration of a Judge and jury. That where an original felonious intent appeared, the ſtatutes did not apply. Where no ſuch intent appeared, if the means mentioned in the ſtatutes were made uſe of, the Legiſlature had made the offender anſwerable criminally, who before by the common law of the land was only anſwerable civilly. That in the priſoner's caſe the intention was apparent, and the jury had rightly found that it was felonious. The crime then was felony, and of a nature which the ſtatute law had made puniſhable with death.

R. v. Charlewood, O. B. Feb. 1786, cor. Gould J. and Perryn B. 1 Leach, 456. Seſſ. Pa. No. 200 S. C.

George Charlewood was indicted before Gould J. and Perryn B. for ſtealing a gelding of John Houſeman. The proſe-

(*a*) On the debate in this caſe Eyre B, adverting to theſe ſtatutes, ſaid he doubted if there were not a diſtinction in this reſpect between the owner's parting with the poſſeſſion and with the property in the thing delivered. That where goods were delivered upon a falſe token, and the owner meant to part with the *property* abſolutely and never expected to have the goods returned again, it might be difficult to reach the caſe otherwiſe than through the ſtatutes; aliter, where he parted with the *poſſeſſion* only: for there if the poſſeſſion were obtained by fraud, and not taken according to the agreement; it was on the whole a taking againſt the will of the owner; and if done animo furandi, it was felony. MS. Buller J.

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Obtaining a horſe by pretending that another perſon wanted to hire it to go to B., but in truth with intent to ſteal it; and not going to B., but taking the horſe elſewhere and ſelling him, held larceny.

cutor was a livery ſtable keeper in Crown Street, St. Ann's, Soho; and on the 4th October 1785 was applied to by the priſoner, a poſt-boy, for a horſe, in the name of a Mr. Ely, ſaying that there was a chaiſe going to Barnet, and that Mr. Ely wanted a horſe for his ſervant to accompany the chaiſe and return with it. The horſe was accordingly delivered to the priſoner by the proſecutor's ſervant about nine o'clock in the morning. The priſoner mounted him, and on going out of the yard, ſaid, he was going no further than Barnet. He accordingly proceeded towards Tottenham Court Road, which led to Barnet, and alſo, though in ſome degree circuitouſly, to Mr. Ely's houſe. Between three and four o'clock in the afternoon of the ſame day the priſoner ſold the horſe in Goodman's Fields for a guinea and a half, including the bridle and ſaddle. The horſe was much injured, and appeared to have been rode very hard. The purchaſer almoſt immediately ſold his bargain for 2l. 15s. The Court obſerved to the jury that the Judges in Pear's caſe under ſimilar circumſtances with the preſent had determined that if the jury were ſatisfied under all the circumſtances, that a perſon, at the time he obtained another's property, meant to convert it to his own uſe, it was felony. That there was a diſtinction, however, to be obſerved in this caſe, though it was ſo nice that it might not be obvious to common underſtandings; for that if they thought that the priſoner, at the time he hired the horſe for the purpoſe of going to Barnet, really intended to go there, but finding himſelf in poſſeſſion of the horſe, afterwards determined to convert it to his own uſe, inſtead of proceeding to the place to which the horſe was hired to go, it would not amount to a felonious taking. That there was yet another point for their conſideration; for although the priſoner really went to Barnet, yet being obliged by the contract to re-deliver the horſe to the owner upon his return to London; if they thought that he performed the journey, and returned to London (*a*); and after ſuch return, inſtead of delivering it to the owner, converted it to his own uſe, he was thereby guilty of felony; for the end and pur-

Ante, 685.

(*a*) *Quære?* For part of the contract was *to return the horſe to the owner in London*; and therefore the contract, if genuine and valid in the firſt inſtance on the part of the priſoner, would ſubſiſt after his mere return to London.

poſe

pose of hiring the horse would be then over. The jury found the prisoner guilty on the first point, that at the time he hired the horse he intended to steal it: and he was afterwards executed.

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Major Semple was indicted for larceny of a post-chaise; and the following facts appeared. The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood, and had before hired a carriage of the prosecutor, for which he had paid. On the 1st September 1785, the prisoner, who then passed by the name of Major Harrold, hired the chaise in question of the prosecutor, saying that he should want it for three weeks or a month, as he was going a tour round the North; and it was agreed that he should pay at the rate of 5 *s.* a-day during that time; and a price of 50 guineas was talked about in case he should determine to purchase it on his return to London, which was suggested by the prisoner; but no agreement took place on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. Lycett's with his own horses; and it was in evidence that he was driven in it from London to an inn at Uxbridge, where he ordered a pair of horses, and went from thence to Bulstrode, and returned to the same inn, where he took fresh horses; but where he went with the chaise afterwards did not appear. No tidings were obtained of him till a year afterwards, when he was apprehended on another charge. It was attempted to distinguish this from Pear's case and Aickles' case, inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them: but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was hired generally for three weeks or a month, and not to go to any certain place: for the mere understanding that it was for the purpose of making a tour round the North made no part of the contract. During that time, therefore, he had a complete dominion over it, and the legal possession; and therefore a tortious conversion pending the contract would not be felony. Besides there was no evidence of a tortious

Major Semple's case, O. B. Sept. 1786, cor. Gould J. and Adair Serjt. Rec. Sess. Papers No. 671. (2 Leach, 470. S. C.)

One obtains possession of a chaise under pretence of hiring it for three weeks or a month, suggesting his intention to go on a tour, and he departs with it, and is not heard of for a year afterwards, when he is apprehended: and then he gives no account of the chaise: Held evidence from whence the jury may infer that he originally took it under the pretence of a hiring with intent to steal it.

Ante, 685.
Ante, 675.

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converſion; for *non conſtat* that the priſoner had diſpoſed of the chaiſe. The Court, however, ſaid that it was now ſettled that the queſtion of intention was for the conſideration of the jury: and that in the preſent caſe, if they ſhould be of opinion that the original taking of the chaiſe was with a felonious intent to ſteal it, and the hiring a mere pretence to enable him to effectuate that deſign, without any intention to reſtore or pay for it, it would fall preciſely within the principle of Pear's caſe, and the other deciſions which had been made; and the taking would amount to felony. For if the owner only intended to give the priſoner a qualified uſe of the chaiſe, and the priſoner had no intention to make uſe of that qualified poſſeſſion, but to convert it to his own uſe, he did not take it upon the contract, and therefore did not obtain the lawful poſſeſſion of it: but if there were a *bona fide* hiring, and a real intention of returning it at that time, the ſubſequent converſion of it could not be felony; for by ſuch contract and delivery the priſoner would have acquired the lawful poſſeſſion of the chaiſe; in which caſe his ſubſequent abuſe of that truſt would not be felony. That as to there being no proof of actual converſion in this caſe, it was not neceſſary; but the jury muſt judge of it from the circumſtances. If the priſoner had ſtaid out ſix weeks, or two months, and on his return had offered to reſtore the chaiſe to the owner, or to pay him for it, ſuch a conduct would have been evidence of an honeſt intention at the time of the hiring: but there was no account given of it, even up to that moment: that therefore raiſed a preſumption againſt the priſoner which it was incumbent on him to repel: and if he could not, the jury would have to conſider from all the facts in proof, Whether the taking were with a felonious intent or not. If it were, the caſe fell directly within the principle which governed that of Pear's, from which it could not be diſtinguiſhed. A caſe was alſo then mentioned as having been determined very lately by the Judges, where a man ordered a pair of candleſticks from a ſilverſmith to be ſent to his lodgings, whither they were ſent accordingly, with a bill of parcels, by a ſervant; and the priſoner contriving to ſend the ſervant back under ſome pretence, kept

kept the goods (*a*): and that was ruled to be felony; although they were delivered with the bill of parcels; such delivery being made under an expectation by the owner of being paid the money: for the jury found that it was a pretence to purchase with intent to steal. Finally, the question of intention being left to the jury in the principal case, they found the prisoner guilty; and he received sentence of transportation for seven years.

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Ante, f. 106.

§ 113. *Review of the above cases.*

I have been thus particular in stating the above cases, because they contain nearly the whole of what can be said on the subject. It is to be collected from them, that if a person obtain the goods of another by a lawful delivery without fraud, although he afterwards convert them to his own use, he cannot be guilty of felony. As if a taylor have cloth delivered to him to make cloaths with; or a carrier receive goods to carry to a certain place; or a friend be entrusted with property to keep for the owner's use; which they afterwards severally embezzle. So if plate be delivered to a goldsmith to work or to weigh, or as a deposit, his conversion of it will not be felony. But if such delivery be obtained by any fraud or falsehood, and with an intent to steal; though under pretence of a hiring, or even a purchase; if in the latter case no credit were intended to be given; the delivery in fact by the owner will not pass the legal possession so as to save the party from the guilt of felony. But if the property were intended to pass by the delivery, there can be no felonious taking.

1 Hale, 504. MS. Burnet, 61. Staundf. 25. a. 1 Hawk. ch. 33. § 3.

1 Show. 50. Kel. 82.

§ 114. *Privity of contract determined.*

3. I come now to the last consideration, which I have before slightly touched upon; by what acts the privity of contract is determined, so as to make the taking of the party with a felonious intent a new taking and trespass, even after a lawful delivery by the owner. It has been before stated in the case of the delivery of a horse upon hire or the like, that if the delivery be obtained *bona fide*, no subsequent wrongful conversion, pending the contract, will amount to felony. But even in such case if the hiring be limited to a

1 Hale, 504.

Per Lord Raymond, at Exeter, 10 Geo. 1 Chapple's MS. 2 MS. Sum. 233.

(*a*) It must be understood that the prisoner ran away with them, or did some other act to denote an intention of withdrawing himself from any account for them; and that no credit was intended to be given to him; but that it was meant as a sale for ready money only. *Vide* Edwards's case, ante, f. 106.

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particular time or place, and after that time be expired, or the party arrived at the proper place of re-delivery, he ride away with the horſe, and convert it to his own uſe, it will then be felony. For as was ſaid by Gould J. in Charlewood's caſe, the end and purpoſe of the hiring, for which the delivery was made, would be then over. And as it has been before ſhewn that the legal poſſeſſion follows the right of property, as ſoon as the ſpecial property of the holder is determined, the legal poſſeſſion reverts to the original owner, in the ſame manner as if there had never been any precedent delivery; after which any new taking by the party for his own uſe will in point of law be a treſpaſs; and if it be done with a felonious intent to ſteal, of which the jury are to judge, will amount to felony. In Tunnard's caſe, which has been mentioned before, where he had borrowed a horſe in the Iſle of Ely to ride three miles, inſtead of which he had ridden the horſe up to London and ſold it; Raymond C. J. Denton J. and Hale B. held it felony; becauſe the privity was determined after he had ridden further than the agreement warranted: but if there had been no ſuch agreement, the privity would have remained, and the riding away would have been no felony: and the C. J. who tried him having left it to the jury to conſider, Whether the priſoner rode away with the horſe with intent to ſteal it, they found him guilty.

Ante, 691.

Ante, 687.

Serjt. Forſter's MS.

Perhaps the circumſtances of that caſe would have warranted the finding of the jury, that the original hiring was a mere pretence to ſteal the horſe, and therefore that the original taking was felonious. At any rate theſe caſes proceeded upon an expreſs limitation as to time or uſe of the lawful poſſeſſion of the bailee, and a ſubſequent unlawful converſion with intent to ſteal, taken up after the determination of ſuch prior lawful poſſeſſion.

Leigh's caſe, Wells, Sum. Aſſ. 1800, cor. Lord Eldon, MS. Jud. *Where the jury found that one who aſſiſted in taking another's goods from a fire in his preſence but*

Elizabeth Leigh was indicted at Wells aſſizes, in the ſummer of 1800, for ſtealing various articles, the property of Abraham Dyer. It appeared that the proſecutor's houſe, conſiſting of a ſhop containing muſlin and other articles mentioned in the indictment, was on fire; and that his neighbours had in general aſſiſted at the time in removing his goods and ſtock for their ſecurity. The priſoner probably had removed all the articles which ſhe was charged with

with having ſtolen when the proſecutor's other neighbours were thus employed. And it appeared that ſhe removed ſome of the muſlin in the preſence of the proſecutor and under his obſervation, though not by his deſire. Upon the proſecutor's applying to her next morning, ſhe denied that ſhe had any of the things belonging to him; whereupon he obtained a ſearch warrant, and found his property in her houſe; moſt of the articles artfully concealed in various ways. The jury found her guilty: but it was ſuggeſted that ſhe originally took the articles with an honeſt purpoſe, as her neighbours had done, and that ſhe would not otherwiſe have taken ſome of them in the preſence and under the view of the proſecutor; and that therefore the caſe did not amount to felony. The jury were inſtructed, that, Whether ſhe took them originally with an honeſt intent was a queſtion of fact for their conſideration; that it did not neceſſarily follow from the circumſtances mentioned, that ſhe took them with an honeſt intent. But even if they were of that opinion, yet that her afterwards hiding the goods in the various ways proved, and denying that ſhe had them, in order to convert them to her own uſe, would ſtill ſupport the indictment. The jury found her guilty; but ſaid, that in their opinion, when ſhe firſt took the goods from the ſhop ſhe had no evil intention, but that ſuch evil intention came upon her afterwards. And upon reference to the judges, in Michaelmas term 1800, all (abſent Lawrence J.) held the conviction wrong: for if the original taking were not with intent to ſteal, the ſubſequent converſion was no felony, but a breach of truſt.

Ch. XVI. § 114. *After privat. of bailment determined.*

without his deſire, and who afterwards concealed and denied having them, yet took them honeſtly at firſt, and that the evil intention to convert them came on the taker afterwards; held no larceny.

§ 115. *By tortious converſion pending the contract.*

There are however ſome tortious acts before the regular completion of a contract, on which goods are delivered, which may determine the privity of it, and amount in law to a new taking from the poſſeſſion of the owner. This principle furniſhes the well-known diſtinction in the carrier's caſe (*a*), which ſeems to ſtand more upon poſitive law, not now to be queſtioned, than upon ſound reaſoning.

If a man deliver goods to a carrier to carry to a certain place, and he carry them away, it is no felony: otherwiſe, if

1 Hale, 504. 1 Hawk. ch. 33. ſ. 5. 7. 3 Inſt. 107.

(*a*) Admitted to be law in all the caſes where the queſtion has been canvaſſed.

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he have a bale or trunk with goods delivered to him, and he break the bale or trunk, and take and carry away the goods with intent to ſteal them. So if he carry the whole pack to the place appointed, and then carry it away with intent to ſteal it; this is a felonious taking by the book of 13 Ed. 4. 9. for the delivery had taken effect, and the privity of the bailment was determined. But that muſt be intended, ſays Lord Hale, where *he carries them to the place, and delivers or lays them down*; for then his poſſeſſion by the firſt delivery is determined, and the taking afterwards is a new taking.

Staundf. 25. 1 Bac. Abr 557. 4 Bla. Com. 230. 2 MS. Sum. 233.

It appears at firſt ſight abſurd to ſay, that if the carrier never carry the package to the place appointed, but ſell the whole, it ſhall not be felony; but that if he take out a part of the goods only, it ſhall be ſo. Yet the diſtinction is well ſettled; for the carrier is truſted with the carriage of it in that condition; and if the package be loſt, ſtolen, or taken, he is anſwerable; and therefore his converſion is a breach of truſt for which the owner may recover the value of the whole in damages. But to conſtitute larceny there muſt be an unlawful taking and treſpaſs; and up to the moment of his parting with the whole package his poſſeſſion is lawful, and he has no unlawful poſſeſſion afterwards whereby to conſtitute a new taking, unleſs he break the package, or ſever part of the commodity from the reſt while it continues in his poſſeſſion.

Kel. 81, 82. 13 Ed. 4. 9.

It is true that Kelynge, in mentioning this caſe of a carrier who took goods to another than the appointed place, where he opened the packs, and took all the goods and converted them, which was ruled to be felony, puts the principle of the determination on a far different footing: not as it is ſtated in other books becauſe the privity of the bailment was thereby determined, but *becauſe his ſubſequent act of carrying the goods to another place, and there opening and diſpoſing of them to his own uſe, declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a deſign of ſtealing them.* There may indeed be evidence of ſuch a previous intent, ſufficient to warrant ſuch a concluſion in point of fact: and whether the particular evidence in that caſe were of ſuch a nature does not appear: but if that inference may be drawn from the

Vide 4 Blac. Com. 230.

mere

mere fact of the carrier's embezzling the goods, there is an end of the distinction at once as to the case of breaking the package and taking out the goods. For if the taking of part of the goods out of the package be evidence of the carrier's having originally intended to take the goods, not upon the agreement, but with intent to steal them, *a fortiori* the taking the whole package of goods itself, whether broken or not, and converting it, must be evidence of such an intent: and so indeed Kelynge himself admits. The same reason is also adopted in the judgment on Pear's case; but it is quoted from Kelynge, and must stand on his authority. But all other writers, as far as I can find, have put this case upon the same footing as Lord Hale; namely, that the privity of contract is determined by the act of breaking the package which makes him a trespasser; in which case the taking the whole, or a part of the contents, makes no difference, as some have supposed.

Ch. XVI. § 115. *By tortious conversion pending bailment.*

Kel. 83.

Ante, 687.

Post. 698.

At the sessions at the O. B. before Mich. T. 1701, the case was, that a woman trusted a porter to carry a bundle for her to Wapping, and went with the porter; and in going to the place, the porter ran away with the bundle, which was lost: and being tried for felony upon this fact, Holt C. J. directed the jury, that if they thought that the porter opened the bundle and took out the goods, it was felony, and they ought to find him guilty: and he thought that the fact, as above stated, was evidence of it. With submission to so high an authority, it may fairly be doubted whether there were sufficient evidence before the jury upon this statement to warrant them in finding that the porter opened the bundle and took out the goods; although we may suspect with great probability that such was the case. A different ground for the determination is suggested in another MS.; namely, that all the circumstances of the case shewed that the porter took the bundle at the first with an intent to steal it. In Wynne's case there was express evidence of the box having been opened by him (*a*). And so there was in Daniel Jones' case, who was the prosecutor's porter, and had the goods delivered to him to carry to a

MS. Tracy, & Denton, 62.

2 MS. Sum. 233.

Ante, 664.

Jones's case, O B. Dec. 1788, Sess. Pap. 1 Leach, 463. n.

(*a*) There too, the prisoner, a few days afterwards denied having ever seen the prosecutrix or the things, or having driven the coach at the time.

wharf

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wharf to be shipped: And in another similar case of John Sears, at the O. B. 1789. And the like occurred in the case of William Bass, though the judgment did not turn on that fact. Another ground for the first-mentioned case of the porter was suggested by some of the judges in the argument of Pear's case, as a matter worthy of consideration, namely, that the bundle, though delivered, being intended to continue in the owner's presence, was in point of law in her possession; upon which I have before ventured to offer a few observations which I see no reason to retract.

Ante, 566.

The separation of part of the goods delivered from the rest with a felonious intent seems however to be material where they are delivered as one entire body or mass, though no case or package be broken; because such an act equally evinces a determination of the privity of contract. Thus if a miller steal part of the meal, though the corn were delivered to him to grind; yet this being taken out from the rest is felony.

MS. Tracy, 60. cites 1 Roll. Abr. 73. pl. 16.

§ 116. *Conclusion.*

Upon the whole of this head of delivery by the owner, it appears that several questions may arise for the consideration of the court and jury.

1. Whether the delivery in fact to the prisoner transferred the legal possession to him, or whether it remained in the owner?

2. If the legal possession were intended to be transferred, but not the absolute property, whether such delivery were obtained fraudulently, and with intent to steal the property? Or,

3. If obtained without such intent, whether the privity of contract were at an end at the time of the conversion, so as to amount to a new taking and trespass?

The consequences in each of these several alternatives have been already stated.

8. *Upon a Taking through Necessity.*

§ 117. *On necessity.* 1 Hale, 54. 565. 1 Hawk. ch. 33. s. 20.

The last excuse or more properly palliation which is sometimes urged upon prosecutions of this nature is that the thing taken was for necessary food or cloathing for the body, in or-

der to preſerve life. This can never be admitted as a legal defence in a country like this, where ſuch humane laws prevail for the care and maintenance of the poor. Even if the caſe exiſted in fact, it would in truth be but little excuſe that the party preferred this method of ſatisfying his neceſſity, rather than apply to the perſons charged with carrying thoſe laws into execution, becauſe perhaps of ſome trouble or apprehenſion of reproof. Yet ſtill in apportioning the puniſhment, the Court will have a tender regard to caſes of real neceſſity, which may and do ſometimes exiſt under the beſt regulated governments. A falſe ſenſe of ſhame has ſometimes tempted perſons, otherwiſe well diſpoſed, to the commiſſion of theſe offences. Sometimes, it is to be feared, they have been driven to it by the cruel and unfeeling conduct of others, who are in ſuch inſtances more juſt objects of ſeverity than the unhappy ſufferers.

Ch. XVI. § 117. *On a taking by neceſſity.*

Of Larceny or Robbery from the Perſon.

§ 118. *Introduction.*

Having in the preceding part of this chapter treated ſo largely of the component parts of the crime of larceny, it will only be neceſſary to ſhew by what additional circumſtances that crime is aggravated when the property is taken from the perſon. For what has been before ſaid of the neceſſity of a taking and carrying away, of what goods, from what perſon, by whom, and with what intent, will equally apply to the preſent ſubject; any occaſional particularities applicable to thoſe heads of inquiry having been reſpectively noticed at the time in the general view of them. The general crime then of larceny from the perſon may be aggravated in two different manners. 1ſt, Where the thing is taken from the perſon *privately without his knowledge.* 2d, Where the perſon from whom it is taken is *put in fear* at the time, or the taking is accompanied with circumſtances of *violence, threat, or terror*, which are ſufficient grounds for preſuming fear; in which caſe it aſſumes the denomination of robbery. I ſhall at preſent confine myſelf to the firſt of theſe offences.

Ch. XVI. § 119. *Clam et secretè by stat.* 8 Eliz. c. 4.

II. *Of Larceny Clam et Secretè from the Person.*

§ 119. 8 Eliz. c. 4. *Clam et secretè.*

This offence is derived from the ſtat. 8. Eliz. c. 4. which reciting that, "whereas certain evil diſpoſed perſons, commonly called cut purſes or pick purſes, but indeed by the laws of this land very felons and thieves, do confeder together, making among themſelves as it were a brotherhood or fraternity of an art or miſtery to live idly by the ſecret ſpoil of the good ſubjects of this realm; and as well at ſermons and preachings of the word of God, and in places and times of doing ſervice and common prayer, in churches, chapels, cloſets and oratories, and not only there, but alſo in the Prince's palace and preſence, and at the places and courts of juſtice, and at the times of miniſtering of the laws in the ſame, and in fairs, markets, and other aſſemblies of the people, and at the time of doing execution, &c. do, without regard to any place, time, or perſon, &c. under the cloak of honeſty by their outward apparent countenance and behaviour, ſubtily, privily, craftily, and felonioufly, take the goods of divers ſubjects from their perſons by cutting and picking their purſes, and other felonious ſlights and devices," &c. enacts (ſ. 2.), "That no perſon or perſons indicted or appealed for felonious taking of any money, goods, or chattels from the perſon of any other *privily without his knowledge*, in any place whatſoever; and thereupon found guilty by verdict, or ſhall confeſs the ſame upon his or their arraignment, or will not anſwer directly to the ſame, or ſhall ſtand wilfully &c. mute, or challenge peremptorily above 20, or ſhall be upon ſuch indictment or appeal outlawed, ſhall be admitted to the benefit of clergy, and ſhall ſuffer death," &c.

§ 120. *Offenders within the act.* 1 Hale, 529, 537. 2 Hale, 366. 2 MS. Sum. 271, 524. Steward's caſe, O. B. 1690, MS. Burnet. Foſt. 356, 418.

1. The ſtatute is confined to him who actually commits the fact, and extends not to acceſſaries before or after, nor even to thoſe who are preſent aiding and abetting. And therefore where ſeveral were indicted for the fact, Raymond C. J., Denton J., and Comyns B. directed him only who took the goods to be found guilty of the privately ſtealing, and the others of the ſingle felony; which latter accordingly

Rex v. Baynes and others, O. B. April 1731, Serjt. Forſter's MS. (*vide* tamen S. C. 1 Leach, 9. ſomewhat different). MS. Tracy, 234.

had

had their clergy. This was ſo ruled by the advice of all the Judges: and ſuch is the conſtant practice at the O. B. and on the circuits. Wherefore if there be an accomplice preſent, and it cannot be told which of them took the goods, neither can be convicted of the capital part of the charge. But in Henry Sterne's caſe, for taking the Duke of Beaufort's George privily from his perſon, the Recorder, who in the preſence of three Judges laid down the ſame rule, yet left it to the jury to conſider, Whether the poſſeſſion of the George by the priſoner, recently after the loſs, were not evidence that he was the perſon who took it: but the jury only found him guilty of the ſimple larceny. In a prior caſe however Eyre B. laid no ſtreſs on this circumſtance, but directed an acquittal of the priſoners as to the capital part of the charge, both being preſent at the fact, which happened while the proſecutor was aſleep for about 10 minutes; though immediately after he awoke, the watch which had been taken from his fob during that interval was found on one of the priſoners.

Ch. XVI. § 120. *Clam et ſecretè by ſtat.* 8 Eliz. c. 4.

Sterne's caſe, O. B. Sept. 1787, Seſſ. Pap. No. 717. 2 Leach, 531.

Mary and Bridget Murphey's caſe, O. B. Ap. 1783, cor. Eyre B. 1 Leach, 302.

2. There muſt be an actual taking from the perſon; taking in his preſence is not ſufficient, as it is in robbery.

Taking from the perſon. 2 Hale, 366.

3. The ſtealing of notes, &c. is within the ſtatute.

Ante, p. 598. & 646.

4. The goods ſtolen muſt be above the value of 12d.; otherwiſe clergy is not ouſted, as in robbery: for the ſtatute was not intended to alter the nature of the crime, but only to exclude clergy, where it was before neceſſary to pray the benefit of it.

Value. 1 Hale, 529. 2 Hale, 366.

§ 121. *Taking privily.*

5. The next and principal conſideration is what ſhall be underſtood by the terms "*privily without his knowledge;*" and this affords two objects of inquiry.

1. *What ſort of a taking is meant as contradiſtinguiſhed from a taking by force?*
2. *What ſort of perſons, in reſpect of the manner in which they are circumſtanced at the time, are within the protection of the ſtatute?*

1. Any ſort of ſecret or ſudden taking from the perſon, without putting him in fear, and without terror or open violence, ſeems within the act; though ſome ſmall force be uſed by the thief to poſſeſs himſelf of the property; provided there

What a taking privily as to the manner.

Ch. XVI. § 121. *Clam et ſecreté by ſtat.* 8 Eliz. c. 4.

there be no reſiſtance by the owner, or injury to his perſon; and the circumſtances of the caſe ſhew that the thing was taken, not ſo much againſt as without his conſent.

Steward's caſe, O. B. 30 April 1690, 2 MS. Sum. 267. cites Chapple's notes. 1 Hawk. ch. 35. ſ. 1.

In Steward's caſe it was ruled by Holt C. J. that ſnatching a hat and wig from the head of a perſon walking in the ſtreet was no robbery, becauſe the party was not put in fear; but that it was *clam et ſecreté* within the ſtatute 8. Eliz. Yet the ſnatching of a hat from a man's head is put by Hawkins as an inſtance of an open larceny in contradiſtinction to *clam et ſecreté*. But Yates J. thought that perhaps the doing it in a ſtreet or crowd, where the thief might not eaſily be diſtinguiſhed, might make the difference. So in Danby's caſe it was holden by Trevor and Eyre, that ſnatching a bundle from a woman in the ſtreet, and running away with it, was a taking *clam et ſecreté* from the perſon. In that caſe the record of Steward's caſe above mentioned was produced. And in Corbett's caſe, O. B. 8th July 1713, there was the like determination by Price and Eyre J. In all theſe caſes a degree of force muſt have been uſed; but the circumſtances ſhewed that the property was taken rather without than againſt the conſent of the ſeveral owners; rather by means of the ſurpriſe and ſlight of hand than by open violence or terror. But it does not appear whether any of thoſe perſons whoſe property was ſo taken were themſelves eye witneſſes of the fact, ſo as to perceive the object of the thief at the moment of the act; though certainly there muſt have been a conſciouſneſs of it. I mention this, becauſe in Brown's caſe, where the priſoner took the proſecutor's watch out of his pocket while ſleeping, but who was thereby awakened juſt at the inſtant, and caught at his watch, but miſſed it. Hotham B., with the advice of Aſton J., left it to the jury whether, under the circumſtances of the caſe, they would acquit the priſoner of *privately* ſtealing, &c. and find him guilty of the ſimple larceny; as it could not be well ſaid to be *privately* ſtealing, when the proſecutor had ſeen part of the fact. In Baker's caſe, O. B. 1783, and in Macauley's caſe at the ſame ſeſſion, the priſoners, who had ſnatched property in the one inſtance from the head of the owner, and in the other from his hands, as they were reſpectively walking in the ſtreet, but without ſpeaking to them or touching or ſtopping them,

2 MS. Sum. 267.

Danby's caſe, O. B. 9 Dec. 1713, 2 MS. Sum. 267.

Corbett's caſe, ib.

Brown's caſe, O. B. about 1777, Serjt. Forſter's MS.

Baker's caſe, 1 Leach, 324.

them, were reſpectively indicted for robbery, and acquitted, by the direction of the Court, of the capital part of the charge; without any intimation that their offences were indictable under this ſtatute. And in Plunket Horner's caſe, upon a ſimilar charge, where the property, an umbrella, was ſnatched ſuddenly out of the proſecutrix's hand, as ſhe was walking along the ſtreet, the Court ſaid that it had been ruled there about 80 years before by very high authority, that the ſnatching any thing from a perſon unawares conſtituted a robbery; but the law was now ſettled, that unleſs there were ſome ſtruggle to keep it, and it were forced from the hand of the owner, it was not ſo. And they ſaid that this ſpecies of larceny ſeemed to form a middle caſe between ſtealing privately from the perſon and a taking by force and violence. The ſame diſtinction had been taken before in Chick's caſe, O. B. December 1781. Certain it is, that all open larcenies from the perſon, as contradiſtinguiſhed from a ſtealing privily without the party's knowledge, are within the benefit of clergy, except robberies and ſuch larcenies as are committed in dwelling-houſes under particular circumſtances, which have been before ſpoken of.

Ch. XVI. § 121. *Clam et ſecreté by ſtat.* 8 Eliz. c. 4.

Horner's caſe, O. B. Jan. 1790, cor. Buller J. and Thomſon B. ibid.

Chick's caſe, ibid. 2 MS. Sum 271.

Ante, 623. &c.

But in no caſe where the property is obtained by any ſtruggling or violence to the perſon does the offence fall within this ſtatute; as is ſhewn more particularly hereafter; when it may alſo be more properly conſidered what is a ſufficient force to conſtitute a robbery.

Poſt. 708. &c.

§ 122. *Upon whom the offence may be committed.*

2. The next point of conſideration, which is intimately blended with the preceding, is, Whether it be neceſſary that the perſon upon whom this offence is committed ſhould be capable of knowledge at the time of the fact? It was formerly holden that perſons aſleep or drunk were not within the protection of the act, which ſpeaks of places of public reſort and the like, where perſons were ſuppoſed to uſe ordinary caution, and not expoſe themſelves by careleſſneſs or miſbehaviour to theſe accidents. Upon this idea the caſe of a man was ruled at the O. B. by Aſton and Gould, Juſtices; in which it appeared that the proſecutor returning home from Vauxhall one night, and being either fatigued or in liquor fell aſleep on one of the benches on Weſtminſter bridge,

Ex relatione. Aſton J. MS. Buller J. and Serjt. Forſter's MS. *The ſtatute extends not to one drunk and aſleep in the ſtreets.*

Ch. XVI. § 122. *Clam et ſecretè by ſtat.* 8 Eliz. c. 4.

bridge, in which ſituation the priſoner ſtole his ſilver buckles. This was then ruled not to be a private taking within the act; for it was ſaid that the ſtatute meant only to protect perſons going about their lawful buſineſs in particular ſituations mentioned therein, and not ſuch idle loitering perſons as were lying about in the ſtreets. And the ſame point was afterwards ruled by Hotham B. upon the authority of the former caſe, and of another which he mentioned in the inſtance of a hackney coachman, whoſe pocket was picked while he was aſleep in his coach. Yet ſubſequent caſes more ſolemnly conſidered have put a more enlarged conſtruction upon the ſtatute in this reſpect; to protect all perſons at leaſt who have not expoſed themſelves to ſuch a loſs by their own negligence or miſbehaviour.

R. v. Reading and Jones, O. B. Dec. 1778, ibid. (S. C. 1 Leach, 276. n.)

Branny's caſe, Carliſle, Sum. Aſſ. 1786, cor. Buller J. MS. Buller J. *Picking another's pocket in the high-way, who was awake but inſenſibly drunk, held within the ſtatute; the perſon having been made drunk by the artifice of the priſoner for that purpoſe.*

William Branny was indicted for privately ſtealing from the perſon of Hugh M'Guinar 43 guineas and 13 half-guineas. The proſecutor was an illiterate Iriſh drover, who ſold cattle at Ravinglaſs fair; where the priſoner, a total ſtranger to him, got acquainted with him under pretence of being his countryman; and having wormed out of him that he had received his money for his cattle, the priſoner and two of his companions followed him to Calder bridge. There the priſoner inſiſted on lying with the proſecutor, which he did; but the latter having put his money in his fob, and faſtened a pin acroſs it, preſerved it for that time. The next morning the priſoner and his companions got up before the proſecutor, and had breakfaſt ready when he came down ſtairs. They all breakfaſted together; and then the priſoner and his companions propoſed to have ſome brandy; and accordingly they had a great quantity, out of which it was contrived that the proſecutor ſhould drink half; with which he was ſo intoxicated that the landlord and his wife propoſed putting him to bed, but the priſoner and his companions ſaid they would take him away with them; and accordingly they put him on a horſe and carried him about 300 yards from the houſe, where the priſoner picked his pocket of his money without his knowledge, and left him in the road. The jury found the priſoner guilty; and alſo found that at the time when he took the money the proſecutor was awake, but inſenſibly drunk. The caſe was

reſerved

reſerved for the Judges to conſider, Whether, under the circumſtances, the priſoner were guilty of a capital offence within the act? On the firſt day of Mich. T. 1786, nine Judges being preſent, they all held the conviction proper. Five of them held that the ſtatute extended to all caſes where goods were ſtolen from the perſon of another without his knowledge, whether he were awake or aſleep, drunk or ſober, &c. The other four then thought that it did not extend to the caſe of a man who was aſleep, but only to caſes where ſome craft or cunning was uſed by the priſoner: But on account of the craft and artifice uſed by the priſoner in this inſtance, they all agreed that his conviction was proper. Gould J. ſaid that the priſoner's whole conduct was *in fraudem legis*.

Ch. XVI. § 12 *Clam et ſecreté by ſtat.* 8 Eliz. c 4.

(Lord Loughborough, Aſhurſt, Hotham, Buller, and Heath, Js.)

Poſt. 706.

At the ſame meeting the caſe of John Thompſon was alſo taken into conſideration. He was indicted for privately ſtealing from the perſon of Jonathan Simpſon, without his knowledge, a ſilver watch. The property was proved to have been taken by the priſoner from the perſon of the proſecutor, a maſter of a ſhip then lying in the river Tyne, whilſt he was aſleep in his cabin, privately and without his knowledge. He was convicted, and Heath J. paſſed ſentence of death on him. But the counſel for the proſecution very candidly producing a caſe decided at Durham ſome years before, wherein it was ruled that the ſtatute did not extend to perſons aſleep, the caſe was reſerved for the opinion of the Judges. Upon the conſultation at this time the caſes which I have before mentioned were quoted and conſidered: but the five Judges above named held the conviction to be proper againſt the other four upon the grounds mentioned in the laſt caſe: ſo the caſe was adjourned to Hil. T. 1787, and again to Eaſter term ſucceeding, when all the Judges agreed that the conviction was proper. And this is now the received conſtruction. For in Willan's caſe, who picked the pocket of a waggoner ſleeping in the ſtables of an inn-yard while his horſes were feeding, the ſame objection being taken as to the conſtruction of the act, the Court ſaid that whatever notions might formerly have prevailed on the ſubject, it was now decided by all the Judges in Thompſon's caſe to be within the act; and

Thompſon's caſe, Newcaſtle Sum. Aſſ. 1786, cor. Heath J. MS. Buller J. and MS. Jud. (S. C. 2 Leach, 498.)

A maſter of a veſſel aſleep in his cabin is within the protection of the act.

Willan's caſe, O.B. June 1788, cor. Adair Serjt. Recorder. 2 Leach, 558.

So a waggoner aſleep in the ſtables of the inn-yard.

Ch. XVI. § 122. *Clam et ſecreté by ſtat.* 8 Eliz. c. 4.

that this had been ſince confirmed by another like caſe at Briſtol.

Margaret Kennedy's caſe, cor. Lawrence J. O. B. Jan. 1797, before all the Judges (except Buller J. abſent) in Hil. Term 1797, MS. Jud. *Aliter where proſecutor was drunk by his own default.*

But where it appeared that the proſecutor being drunk was picked up by the priſoner, a woman of the town, in the ſtreet, and went with her to a houſe, where he fell aſleep; during which time, without his perceiving it, ſhe picked his pockets of two guineas and upwards; the Judges, on reference to them after conviction, held that the caſe did not fall within the ſtat. 8. Eliz. being only ſimple larceny: and that this was diſtinguiſhable from Branny's caſe; there having been no fraud uſed by the priſoner in making the proſecutor drunk, but he having fallen into that ſtate by his own default: and that it was all to be taken as one tranſaction.

Gribble's caſe, O. B. Feb. 1782. 2 Leach, 275.

The caſe of Gribble, which was there referred to, was of the ſame ſort. The proſecutor and the priſoner having drank together in a public houſe till both were much intoxicated, afterwards went together to the priſoner's lodgings, where the proſecutor falling aſleep, the priſoner took that opportunity of ſtealing his watch: and it was ruled by the Court that the caſe was not within the ſtatute, but only ſimple larceny.

§ 123. *Indictment and verdict.* 1 Hale, 529. 2 Hale, 366. 2 MS. Sum. 266. 271. 3 Bulſtr. 71. 1 Hawk. ch. 36. ſ. 4. 2 Hale, 190. Cro. Cir. Comp. 304.

The indictment muſt lay the offence to have been done *privily without the knowledge* of the party, in exact purſuance of the words of the ſtatute; otherwiſe the priſoner will be entitled to his clergy. And ſo he is if the value be not laid as well as proved to be above 12d. But the indictment need not conclude *contra formam ſtatuti*: for this was a felony before; and the ſtatute does not inflict a new puniſhment or alter the nature of the crime, but only takes away clergy under the circumſtances. And in this, as in other aggravated larcenies, the priſoner may be acquitted of the capital part of the charge, and found guilty of ſimple larceny.

III. *Of Robbery, (properly ſo called.)*

Ch. XVI. § 124. *From the perſon by violence or terror.*

The next ſpecies of aggravated larceny from the perſon is robbery; which is a felonious taking of money or goods, to any value, from the perſon of another, or in his preſence, againſt his will, by violence or putting him in fear. Upon which ſeveral points occur for conſideration, ſome of which have been already diſpoſed of. What is a ſufficient taking, of what goods, by what perſon, from whom, and with what intent, have been treated of largely before. It remains to ſee,

§ 124. 2 MS Sum. 258. 1 Hale, 532, 4. 4 Blac Com 242. Poſt 123 Ante, 553. &c.

1. *How far the value is material.*
2. *What ſhall be ſaid to be a taking from the perſon.*
3. *What degree of violence or putting in fear is neceſſary.*

What is neceſſary to be ſhewn touching clergy; the manner of laying the offence in the indictment; and what verdict may be given thereon, will be hereafter ſtated.

1. *As to the Value.*

§ 125. *Value.* 3 Inſt. 69. Sum. 73. 1 Hawk. ch. 34. ſ. 3. 9. Staundf. 27. 1 Hale, 531. *Vide* poſt. ſ. 138. as to clergy. Ante, 415.

It is ſufficient to ouſt clergy if the thing taken be of any value, though under 12 d.; for the gift of the offence is the force and terror. But ſome thing muſt be taken; for an aſſault with intent to rob is an offence of a different and inferior nature, which has been already mentioned.

2. *What is a taking from the Perſon.*

§ 126. *What is a taking from the perſon.* 3 Inſt. 68, 9. 1 Hale, 533. Staundf. 27. Pult. de pace, 131. b. 1 Hawk. ch. 34. ſ. 5. 4 Blac Com 242. Ante, 3, 4 8. 1 Sid. 263. *Sed vide* Gould. 86. *Vide* poſt. Merriman' caſe.

In robbery, it is ſufficient if the property be taken in the preſence of the owner; it need not be taken immediately from his perſon, ſo that there be violence to his perſon or putting him in fear. As where one, having firſt aſſaulted another, takes away his horſe ſtanding by him; or having put him in fear, drives his cattle out of his paſture in his preſence, or takes up his purſe which the other in his fright had thrown into a buſh, or his hat which had fallen from his head. Where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day time,

Ch. XVI. § 126. *What is a taking from the perſon.*

but did not rob the goods till night, ſome have holden it to be a robbery from the firſt force; but others conſider that the waggoner's poſſeſſion continued till the goods were actually taken, unleſs the waggon were driven away by the thieves themſelves. But where thieves ſtruck money out of the owner's hands, and by menace drove him off ſo that he could not take it up, and then they took it up themſelves; it not being found in the ſpecial verdict that they took up the money in the ſight or preſence of the owner, the court would not intend it. And as the firſt ſtriking the money out of his hand was without putting him in fear, the priſoners were conſequently entitled to their clergy (*a*). And the ſame was reſolved by K. B. in the caſe of The King v. Grey and others, with the concurrence of all the Judges.

R. v. Francis and others, 2 Stra. 1015. Com. Rep. 478. S. C.

R. v. Grey and others, E. 8 G. 2. MS. Burnet, 73.

3. *What Violence or Fear is neceſſary.*

§ 127. *Violence or Fear ſufficient.*

It was before ſtated, as part of the definition of this offence, that the property muſt be taken from the perſon by violence or by putting him in fear: and certainly it is not only true that either of theſe circumſtances is ſufficient to conſtitute the offence, but if either be laid in the indictment, it is enough; provided it appear that the property was taken without or againſt the will of the party by one or other of the means aftermentioned; ſome of which have already been alluded to in conſidering what ſhould be deemed a taking. As to the ſort of violence neceſſary to be proved, where the property is obtained in that manner, it has been already in part conſidered under the laſt diviſion of this ſubject. It was there ſhewn that no ſudden taking of a thing unawares from the perſon, as by ſnatching any thing from the hand or head, is ſufficient to conſtitute a robbery, unleſs ſome injury be done to the perſon, or unleſs there be ſome previous ſtruggle for the poſſeſſion of the property.

Per Holt C. J. at a conference of all the Judges after Trin. T. 3 Ann. MS. Tracy, 71. Dyer, 224. b. pl. 30. Poſt. f. 167. 4 Blac. Com. 242, 3. Ante, p. 555.

Ante, f. 121.

In Lapier's caſe before mentioned, although Mrs. Hobart's ear-ring was pulled ſo ſuddenly from her ear that ſhe

Lapier's caſe, ante, f. 4.

(*a*) As the only doubt raiſed by the ſpecial verdict was, Whether the priſoners were or were not guilty of robbery, the Court thought that judgment could not be given againſt them on that record as for grand larceny, of which it appeared that they were guilty: therefore they were remanded to be tried for that offence on another indictment.

had

had no time or opportunity for reſiſting, yet being done with ſuch violence as to injure her perſon, the blood being drawn from her ear, which was otherwiſe much hurt, the priſoner was holden guilty of robbery. Ch XVI § 127. *By violence.*

Davies alias Beard was indicted for taking a gentleman's ſword from his ſide *clam et ſecreté:* but it appearing that the gentleman perceived that Davies laid hold of his ſword, and that he himſelf laid hold of it at the ſame time and ſtruggled for it; this was adjudged robbery. Davies's caſe, O. B. 11 Ann. 2 MS. Sum. 267. Cites Denton's MS. MS. Tracy, 75.

In regard to taking by force under any lawful or indifferent pretence; that has been partly noticed under the firſt head of inquiry; but whatever the pretence may be, if the true intent be to ſteal under the definition before given, and the poſſeſſion be obtained by force and violence from the perſon of the owner or in his preſence, it amounts to robbery. Ante, f. 3.

Merriman, carrying his cheeſes along the highway in a cart, was ſtopped by one Hall, who inſiſted on ſeizing them for want of a permit; (which was found by the jury to be a mére pretence for the purpoſe of defrauding Merriman, no permit being neceſſary); and on ſome altercation, they agreed to go before a magiſtrate to determine the matter. In the mean time other perſons riotouſly aſſembled on account of the dearneſs of proviſions, and in confederacy with Hall for the purpoſe, carried away the goods in Merriman's abſence. It was objected to be no robbery; there being no force uſed; but only larceny; but Hewitt J. over-ruled the objection, and left it to the jury, who found it robbery, and found a verdict for the plaintiff Merriman in an action againſt the Hundred of Chippenham, on the ſtatutes of hue and cry: and upon motion for a new trial in M. 8. Geo. 3. the Court of K. B. were clearly of the ſame opinion (*a*). Merriman v. The Hundred of Chippenham, M. 8 G. 3. B. R. MS. Buller J.

Samuel Gaſcoigne was indicted for a highway robbery on Jane Edwards. It appeared in evidence that the proſecutrix was brought before a magiſtrate on a complaint for an aſſault upon another woman. The magiſtrate [as the priſoner alledged, though it was not produced,] made out a warrant of commitment for the proſecutrix, at the ſame time adviſing Gaſcoigne's caſe, O. B 1782, MS. Buller J. (S. C. 1 Leach, 313.) *A runner at the police-office taking money out of the hand and pocket of a priſoner, who was bailed before handcuffed and was conducting to pri-*

(*a*) This opinion muſt have been grounded on the conſideration, that the firſt ſeizure of the cart and goods by Hall being by violence, and whilſt the owner was preſent, conſtituted the offence a robbery. *Vide* ante, f. 125.

Ch. XVI. § 127. *By violence.*

son, under pretence of letting her go home, and paying for coach-hire and liquor which he had himself ordered, is guilty of robbery; the jury finding that all this was done with a felonious design to get her money; although the party in custody had before offered him the money if he would let her go home, and repeated the offer after he had taken it in that manner.

the parties to make it up. The prosecutrix sent for her husband, and on his arrival, the affair not being ended, he went away to get bail, of which she informed the magistrate; but the latter leaving the office, the prisoner told her that he would take her to gaol. She intreated him to stay till her husband returned, but he refused to wait even a quarter of an hour. He then asked her if she would have a coach, which she declined; but a coach was sent for. She then besought him not to send her away from her family till her husband returned, and she offered him a shilling which she had in her hand if he would permit her to stay till her husband's return; but he refused, and kicked her into a coach, and handcuffed her to a man who was then going to prison, and who had before rescued himself, as the prisoner alledged. The prisoner also came into the coach, and put his handkerchief to her mouth, and took the shilling out of her hand, and said, "this will buy us a glass a-piece." He then asked her for more money, and said he would bring her back; and immediately put his hand in her pocket, and took all the money he could find, which was 3s., and said he would carry her back. He then stopped the coach at an ale-house, and bid the coachman call for gin, which he drank, and gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused; but he insisted she should drink it. He gave the shilling he first took from her to pay for it, and took 6d. in change. She made no complaint then, as he had promised to carry her back, but said if he would do so, he should be welcome to the other 3s.; instead of that she was carried to prison. No part of the money was ever returned to the prosecutrix; but the coachman said that the prisoner paid for the coach either 1s. or 1s. 6d. The prisoner was not a constable or officer, but at that time attended the public office; nor did it appear that he in particular had any order to carry the prosecutrix to prison. Nares J. left the case to the jury, with this direction, that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he did take the money with a felonious intent, they should find him guilty; otherwise they should acquit him.

The

The jury found him guilty, and added, that he had a felonious intent of getting what money the woman had; and that the putting of her in the ſtate proved was only a colourable mean of carrying his felonious intent into execution. In Mich. T. 1783, all the Judges were of opinion that this was robbery.

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See the judgment delivered by Aſhhurſt J. O. B. Jan. 1784, Seſſ. Pap. p. 295.

Robbery may alſo be conſtituted by putting in fear as well as by force; or perhaps in ſtrictneſs it may be ſaid that fear will ſupply the place of force. Yet it is not neceſſary that actual fear ſhould either be laid in the indictment, or ſtrictly and preciſely proved; provided the property be taken with ſuch circumſtances of violence or terror, or threatening by word or geſture, as would in common experience induce a man to part with it from an apprehenſion of perſonal danger; for the law, *in odium ſpoliatoris*, will preſume fear where there appears to be ſo reaſonable a ground for it. But it is neceſſary that it be taken againſt the will of the party. If a man be knocked down without previous warning, and ſtripped of his property while ſenſeleſs, he can with no propriety be ſaid to be put in fear; and yet that would undoubtedly be robbery. So a colourable gift, which in truth was extorted by fear, amounts to a taking and treſpaſs in law. As if a perſon with a drawn ſword, or other circumſtances of terror indicating a felonious intent, beg alms of another, who gives it him through miſtruſt and apprehenſion of violence, the offence is the ſame notwithſtanding the pretence. So it is whether there were any weapon drawn or not: or whether it were an offenſive weapon: or whether the perſon aſſaulted delivered his money upon the other's command, or afterwards gave it him upon his ceaſing to uſe force, and aſking it for alms; for the owner was put in fear by the aſſault, and there remained a reaſonable ground for its continuance.

§ 128. *Fear.*

Foſt. 128, 9. 1 Hale, 533, 4. per Holt C. J. at a meeting of the Judges after Trin. Term, 7 Ann. MS. Tracy & Denton. 71. 2 MS. Sum. 264. 4 Blac. Com. 243.

Ante, p. 555.

1 Hawk. ch. 34. ſ. 6. Foſt. 128.

The ſame rule holds, although the thing taken were not really within the original contemplation of the robber, nor the object of his purſuit at the time.

Blackham aſſaulted a woman with intent to commit a rape, and ſhe without any demand from him offered him money, which the priſoner took and put into his pocket, but

Rex v. Blackham, Trin. Term 1787, 2 MS. Sum. 262. MS. Gould J. and MS. Jud.

Ch XVI. § 128. *By fear.*

but continued to treat her with violence to effect his original purpoſe, till he was interrupted by the approach of another perſon. This was holden to be robbery by a conſiderable majority of the Judges: for the woman, from violence and terror occaſioned by the priſoner's behaviour, and to redeem her chaſtity, offered the money, which it was clear ſhe would not have given voluntarily; and the priſoner, by taking it, derived that advantage to himſelf from his felonious conduct; though his original intent were to commit a rape.

Taking money to deſiſt from a rape.

Taplin's caſe, O. B. June 1780, cor. Nares J. MS. Buller J. *Vide* Brown's caſe, poſt.

During the riots in London in the year 1780, a boy with a cockade in his hat knocked violently at the door of the proſecutor Mahon, who thereupon opened it; and the boy ſaid to him, "God bleſs your honour, remember the poor mob." Mahon told him to go along; on which he ſaid, "Then I will go and fetch my captain." He went; and the mob, to the amount of 100, armed with ſticks and what elſe they could get, ſoon after came, headed by the priſoner Thomas Taplin on horſeback, having his horſe led by the ſame boy. On their coming up, the byſtanders ſaid, "You muſt give them money;" and the boy ſaid, "Now I have brought my captain." Some of the mob ſaid, "God bleſs this gentleman, he is always generous." Mahon then aſked the priſoner, "How much?" who anſwered, "Half-a-crown, Sir." On which Mahon, who had before only intended to give a ſhilling, gave the priſoner the half-crown. On this the mob gave three cheers, and went to the next houſe. This was holden robbery.

Rex v. Simons, Cornwall Lent Aſſ. 1773, 2 MS. Sum. 262. MS. Gould J. and MS. Jud. Ante, f. 98.

If a perſon by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer, leſs than the value; this is alſo robbery. As where the priſoner took a buſhel and an half of wheat worth 8s. and forced the owner to take 13½d. for it, threatening to kill her if ſhe refuſed; this was clearly holden to be a robbery by all the Judges upon a conference.

Spencer's caſe, York Sum. Aſſ. 1783, cor. Buller J. MS. Buller J.

Again in the caſe of one Spencer, the proſecutor Anderton ſwore, that having in his poſſeſſion corn belonging to other perſons, the priſoner came to him, together with a great mob marching in military order; and one of the mob ſaid, that if he would not ſell, they were going to take it away;

away; and the prisoner said that they would give 30s. a-load, and if he would not take that, they would take the corn away; on which the prosecutor sold that for 30s. which was worth 38s.: this was ruled to be robbery, and the prisoner was convicted and executed. Ch. XVI. § 128. *By fear.*

§ 129. *Fear of what nature.*

It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is no where defined in any of the acknowledged treatises upon this subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. Lord Coke and Hawkins do the same. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of the party*, and he lays the circumstance of fear out of the question; or that at any rate when the fact is attended with circumstances of violence or terror, the law *in odium spoliatoris* will presume fear if it be necessary, where there appears to be so just a ground for it. Mr. Justice Blackstone leans to the same opinion. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of any thing from the person or in the presence of another *openly, and against his will*; and Bracton also rests it upon the latter circumstance. I have the authority of the Judges as mentioned by Willes J. in delivering their opinion in Donally's case, at the O. B. 1779, to justify me in not attempting to draw the exact line in this case; but thus much I may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury; and on the other hand it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him as it were under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence, or assault upon the person.

1 Hale, 534. 3 Inst. 68. 2 Hawk. ch. 34. Fost. 123. 128.

Vide post. f. 132.

4 Blac. Com. 242.

Staundf. lib. 1. c. 20.

Brac. lib. 3. fo. 150. b.

Donally's case, post. 715.

Before I state the cases which have occurred in modern times on this subject, I shall mention a case of robbery on this head, instanced by nearly all the writers on the subject, which

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by ſome does not appear to have been clearly underſtood.

Staundf. 27. 1 Hale, 532. 3 Inſt. 68. 1 Hawk. ch. 34. ſ. 1.

Thieves come to rob *A.*, and finding little about him, enforce him by menace of death to ſwear to bring them a greater ſum, which he does accordingly (*a*); this is robbery; not for the reaſon aſſigned by Hawkins, becauſe the money was delivered while the party thought himſelf bound in conſcience to give it by virtue of the oath which in his fear he was compelled to take; which manner of ſtating the caſe affords an inference that the fear had ceaſed at the time of the delivery, and that the owner then acted ſolely under the miſtaken compulſion of his oath. But the true reaſon is given by Lord Hale and others; *becauſe the fear of that menace ſtill continued upon him at the time he delivered the money*; and therefore the indictment need not be more ſpecial than in ordinary caſes.

§ 130. *On accuſation of an unnatural crime.* R. v. Jones, alias Evans, O. B. Feb. 1776, cor. Hotham, B. MS. Gould J. Serjt. Forſter's MS. (S. C. Leach, 164.) *Extorting money by threatening to charge the party with an unnatural crime, is robbery.*

The priſoner was indicted in the uſual form for a highway robbery. The facts proved were, that the priſoner, an entire ſtranger to the proſecutor, followed him out of the theatre, where they had accidentally met, into the ſtreet, and aſked him whether he did not chooſe to drink; the proſecutor replying that it was his intention ſo to do, the priſoner followed him into a public houſe, where they drank ſome porter: after which the priſoner aſked him what he meant by thoſe liberties that he had taken with his perſon at the play-houſe; and on the proſecutor's expreſſing his ſurpriſe at what he meant, the other continued in the ſame ſort of ſtrain, which frightened the proſecutor very much; and he went out intending to get away from him: but the priſoner followed and ſeized him by the arm, threatening to raiſe the mob if he attempted to run; and telling him that he had offered him an indignity not to be borne, and for which nothing could make ſatisfaction. The proſecutor then being exceedingly terrified, aſked him what he

(*a*) This caſe was alluded to by one of the judges at the conference on Reane's caſe aftermentioned (ſ. 132.), who obſerved that it was not exactly as ſtated by Lord Hale. That it ſeemed a more immediate act than appeared by that book; and was to be found in *Fitz. Abr. Coron.* 464. 4 *Hen.* 4. *Staundf.* 27. *a.* *F.* 42 *Ed.* 3. 14. *b.*

would

would have him do. The priſoner replied that he muſt make him a preſent; which he explained by ſaying that he muſt give him what money he had about him: on which the proſecutor gave him 3 guineas and 12s. being all he had. The other took it, and inſiſted on more, all the time holding the proſecutor faſt by the arm; and at laſt followed him home, and called again the next morning, and got ſome more money. It was left to the jury to conſider, Whether the proſecutor were put in fear, and under that impreſſion had parted with his money. And the jury declared that they thought ſuch an accuſation would ſtrike a man with as much or more terror than if he had a piſtol at his head; and they found the priſoner guilty: but judgment was reſpited to take the opinion of the Judges, whether theſe circumſtances would ſupport a conviction for a highway robbery. In Eaſter T. 1776, nine Judges preſent agreed that the conviction was proper: for to conſtitute robbery there was no occaſion to uſe weapons or real violence; but that taking money from a man in ſuch a ſituation as rendered him not a free man; as if a perſon ſo robbed were in fear of a conſpiracy againſt his life or character, was ſuch a putting in fear as would make the taking of his money under that terror a robbery; and they approved of Brown's caſe in point, which was tried before Eyre B. when Recorder.

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(Abſent De Grey C. J. and Aſhurſt J. and one vacancy.)

Brown's caſe, O.B. Oct. 1763.

Robert Harrold was afterwards convicted for a ſimilar robbery, with the approbation of the Judges.

Harrold's caſe, alias Hutton, O B. June 1778.

This matter was again moſt deliberately conſidered in Donolly's caſe, who was tried at the O. B. 1779, for a highway robbery. It appeared that as the proſecutor was paſſing through Soho-Square one evening, he was accoſted by the priſoner (a ſtranger to him), with a deſire that he would give him a preſent. The proſecutor aſked for what? the priſoner anſwered, "You had better comply, or I will take "you before a magiſtrate, and accuſe you of an attempt to "commit an unnatural crime." The proſecutor then gave him half a guinea, which the priſoner ſaid was not ſufficient; but the other had no more in his pocket. Two days afterwards, in the evening, the proſecutor again met the priſoner in Oxford-Road, who made uſe of the ſame threats as before, telling the proſecutor that he knew what paſſed in Soho-

R. v. Jas. Donolly, O. B. Feb. 1779, cor. Buller J. MS. Buller J. and MS. Jud. (S. C. 1 Leach, 229.)

Obtaining money from another by force of a threat of carrying him before a magiſtrate and accuſing him of an unnatural crime, is robbery.

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Soho-Square, and unleſs he would give him more money, he would take him before a magiſtrate, and accuſe him of the ſame attempt; adding, that it would go hard with him, unleſs he could prove an alibi. The proſecutor then went into an adjoining ſhop, whither the priſoner followed him, and ſtaid at the outſide of the door. The proſecutor took a guinea out of his pocket and gave it to the ſhopkeeper, deſiring him to give it to the man at the door, which was done; and the priſoner then departed. The proſecutor then depoſed that he was exceedingly alarmed on both occaſions, and under that alarm gave the money. That he was not aware what were the conſequences of ſuch a charge, but apprehended it might coſt him his life. The jury were deſired to conſider, 1ſt, Whether, upon the evidence, they were ſatisfied that the proſecutor delivered his money through fear and under an apprehenſion that his life was in danger? Or 2dly, If they did not think that the proſecutor apprehended his life was in danger, whether the money were not obtained by means of the priſoner's threats, and againſt the will of the proſecutor? For if it were, even in that caſe, though he were not in fear of his life, the crime would amount to robbery. The jury found the priſoner guilty; and ſaid they were ſatisfied that the proſecutor delivered his money through fear and under an apprehenſion that his life was in danger.

There being ſome difference of opinion among the Judges on this caſe, they directed it to be argued before them, which was done on 29th April 1779, at Lord C. J. De Grey's houſe, preſent all the Judges; when after very full conſideration, they at length all agreed that the caſe amounted to robbery. In the courſe of their debate, many of the Judges touched on the queſtion which I have before alluded to, as to the nature of the fear moving the party to part with his property in caſes where no actual violence was employed to obtain it; which I think the more worthy of remark as I do not find any expreſs authority upon the ſubject in point. I ſhall therefore ſhortly advert to the grounds of their opinion.

Buller J. held firſt that the caſes which had been decided on this ſubject, [and which have been before ſtated], concluded

concluded the preſent queſtion. And ſecondly, that independent of thoſe caſes, this was robbery on general principles. For which he relied chiefly on Foſt. 128 and 1 Hale, 533, 4. That to conſtitute a robbery, it was not neceſſary that there ſhould be any weapon drawn, or an actual laying of hands on another, which in fact ſeldom happened. But if ſuch threats were uſed as would impoſe terror on a reaſonable man's mind, and would leave him not a free agent, but induce him to part with his money againſt his will, it was robbery, in whatever words the threat was conveyed. Whether a thief, who ſtopped a man, ſaid, "Give me your money," "deliver your money," or "make me a preſent;" it was equally robbery; for the intention was the ſame, namely, to force the man ſo attacked to part with his money againſt his will. That if nothing more had been ſaid in this caſe than "give me a preſent," he ſtill thought it would have been a robbery; for that was a demand of money: and if that demand were ſo made as to impoſe a fear on the mind of the perſon attacked, and under that fear he parted with his money, it brought the caſe exactly within the definitions of robbery given by Lord Hale and Mr. Juſtice Foſter. But the ſubſequent words uſed were a threat of immediate violence and perſonal injury; and the priſoner's ſaying, when the proſecutor had given him half-a-guinea, that it was not ſufficient, was a plain proof that he meant to force from him all the money he had about him. He alſo held that a fair argument was to be drawn from the ſtatute 7 G. 2. c. 21. which made it felony for any perſon by menaces or in a violent manner to demand money with intent to rob: and the ſtat. 30 G. 2. c. 24. which makes it a tranſportable offence to ſend a letter threatening to accuſe, &c. with a view or intent to extort money. For it could not be ſuppoſed that the legiſlature would not at the ſame time have provided for caſes where money actually was obtained, as where there was only an attempt to obtain it, unleſs they had been ſatisfied that if the money were obtained it was a robbery.

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PERRYN B. was at firſt of opinion that this was not robbery. He diſtinguiſhed it from Brown's caſe, where there was actual violence uſed in the aſſault, and laying

Ante, 715.

Ch. XVI. § 150. *Fear of what nature.*

on the party; and alſo from Jones's caſe, where there was a continual force and violence, a mob and crowd, to whoſe reſentment and violence the proſecutor apprehended he ſhould be delivered up. That the caſe depended on the definition of robbery, which Lord Hale and Hawkins agreed was a felonious and violent taking againſt the party's will; and he thought it neceſſary, in all caſes of robbery, either that there ſhould be actual force or a threat of it; as to deliver the party to the mob, or to carry him to a horſe pond, or the like; which he thought would be ſufficient. But that here the party had his option either to deliver his money or not, and it was rather a caſe of giving than taking. However, after hearing the opinions and reaſons of the other Judges, he deſired to retract his opinion, and concurred with them that this was robbery.

Ante, 714.

Hotham B. ſaid, that as to the former caſes determined on this ſubject, there was in each ſo much of force as, abſtracted from other conſiderations, would conſtitute robbery. But the queſtion was, Whether getting money from a perſon under ſuch a threat as the preſent, without actual force, were robbery? That he was clearly ſatisfied that it was not neceſſary, in order to conſtitute a robbery, where the property was obtained by means of a threat, without actual force, that there ſhould be a fear of death in the party robbed, or an immediate fear of danger to his perſon. In the caſes put in argument, of one man walking with his child, who delivered his money to another, upon a threat that unleſs he did ſo that he would deſtroy the child (*a*); or of another man parting with his money, in order to ſave his houſe from being fired; he had no doubt but that in either caſe it was ſufficient to conſtitute robbery. That if a man parted with his money under ſuch circumſtances as that he could not reſiſt the demand without fear of injury to his perſon or property, the offence was complete. In this caſe there was a

(*a*) Bracton, lib. 2. cap. 5. (in treating ſ. 13. & 14. Quod donatio ſit gratuita et non coacta; et quid ſit metus;) ſays, fo. 16. b. "Et non ſolum excuſatur quis "qui exceptionem habet, ſi ſibi ipſi inferatur vis vel metus; ſed etiam ſi ſuis; "ut ſi filio vel filiæ, fratri vel ſorori, vel aliis domeſticis et propinquis; ſicut de "eodem Falcone, qui tenuit in priſonâ fratrem cujuſdam, donec frater ejuſdem "qui fuit extra priſonam dedit ei quoddam manerium."

fear of diſgrace, if not of life, in being carried through the ſtreets under a charge of this nature; the fear of which did not leave the party a free agent to reſiſt or comply with the demand. That Mr. Juſtice Foſter, in his definition of robbery, conſidered the doing of the act *violently* or *againſt the will of the party*, as ſynonimous terms: and whether the party were obliged to part with his money from fear of perſonal danger, or of loſs of character, was the ſame thing; it being equally againſt his will in either caſe. Ch. XVI. § 130. *Fear of what nature.*

Eyre B. expreſſed himſelf in great doubt at firſt, though he ſtated the leaning of his opinion to be that it was robbery. He ſaid his difficulty lay in drawing the line between robbery, and extorting money by undue influence. As to the notion of putting in fear, it had been carried a great deal too far, as connected with the definition of this offence. It ſeemed to him to be rather a conſequential than eſſential part of the offence. It had been decided that putting in fear need not be laid in the indictment. If there were a taking by force, though no fear, it was never doubted but that it amounted to robbery. That the firſt and general definition of the offence was a violent and felonious taking from the perſon. An old author [Weſt, Symbol. 90.] ſays a violent taking from the perſon, becauſe in law it impoſes fear. The old precedents of indictments never ſtated the putting in fear: there were many ſuch in Weſt: others ſtated *in corporali timore*; but *in fear of life* was of very modern introduction. That in the caſe mentioned from Dyer, 224 b. pl. 30. it was holden no robbery, becauſe there was no putting in fear: but there the indictment did not lay the offence to have been done *violenter*. Perhaps from that time this form of indictment grew into uſe. That as to the caſe where the owner delivered his money on demand, it muſt amount to a conſtructive taking, in order to make it robbery. If a piſtol were preſented to a man, though nothing were ſaid, it was a conſtructive force. That there muſt be fear either in the caſe of a conſtructive or an actual taking; but it was a conſtructive fear. A menace of any kind which operated ſo far on a man as to put him in his own apprehenſion under a neceſſity of delivering his money to another, who

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who meant to ſteal it, was a conſtructive force: and if the owner were laid under a moral neceſſity of delivering his money to another, it was a conſtructive taking. At the concluſion of the debate the learned Judge declared himſelf perfectly well ſatisfied that this amounted to robbery.

Nares J. ſaid, he ſpoke with diffidence, though he had a formed opinion that this was robbery, according to the legal definition of it by Lord Hale and Hawkins taken together. That an actual aſſault was not neceſſary; putting in fear was equal to it. By Staundf. 27. a. if one menace another to deliver his money immediately or he will kill him, it is robbery as much as if he took it from his perſon. Dalton indeed ſays, that the taking muſt be by force or violence; but he had miſtaken Dyer, 224. b. That here it was found by the jury that the proſecutor delivered his money under an apprehenſion that he was in fear of his life. Should it be ſaid in anſwer that he did not know the law; that made no difference. The queſtion was, What effect the threat had on his mind? If he ſo apprehended it, it was ſufficient. That it would be of the utmoſt ill conſequence to ſay, that a man might have the ingenuity to get money from another as much againſt his will as if he had preſented a piſtol to his breaſt, and yet he ſhould not be puniſhed for it. That larceny was a felonious and fraudulent taking of the goods of another, &c. and this was a ſpecies of fraud practiſed by the priſoner; and the money having by means of it been obtained as much againſt the will of the party as if he had ſhot at him, the offence amounted to robbery.

Aſhhurſt J. ſaid, he was very averſe to extend the law to caſes not formerly conſidered as falling under the crime; but ſtill the law ſhould keep pace with the times, if it could be done without an extenſion of the principles on which it was founded. And he conſidered the principle which governed the offence of robbery to be, where money was taken from another againſt his will under ſuch circumſtances of violence or terror as did not leave him a free agent. That in burglary ſuch conſtructions had taken place as were neceſſary to meet the frauds by which the law was endeavoured to be evaded. Breaking and entering a houſe, in common acceptation meant the breaking of a door or window, and going

into

into the houſe: but yet it had been conſtrued to extend to breaking a pane of glaſs, and putting in the hand of the perſon. The ſame latitude had taken place in the conſtruction of this offence. The caſe of a man taking money to a robber, in conſequence of an oath impoſed on him by the latter, was a fear upon the mind only, and no fear of perſonal danger at the time. So here, if the proſecutor were not in fear of his life, yet if he were induced to part with his money under a fear for his character, it was a terror on the mind, and amounted to robbery. Ch. XVI. § 130. *Fear, of what nature.*

Blackſtone J. ſaid, that the difficulty of the caſe was in drawing the line for the firſt time. That Jones's caſe was law; but it turned on the circumſtance of force and violence, which gave a reaſonable apprehenſion of immediate danger. There was a threat to deliver the party up to the mob as a ſodomite, beſides the circumſtance of laying hold of his arm. That to conſtitute robbery there muſt either be violence or a putting in fear of it. There was no caſe in which one or the other had not been holden neceſſary. The primary idea of robbery was, that the act muſt be done with violence: putting in fear was only a conſtructive conſequential violence. But the principal queſtion was, What it ſhould be a fear of? and he thought the menaces or apprehenſion muſt be of violence likewiſe. If that line were departed from, there was no telling where to ſtop. If this ſpecies of fear were holden ſufficient, any other may be ſo. That dureſs *per minas* was defined to be fear of life or bodily harm. Bracton ſaid it muſt be ſuch a fear as would fall *in conſtantem virum*; and 2 Inſt. 483. was to the ſame effect. Threatning to burn a man's houſe was no dureſs. That as to the caſe put of threatening the life of a child, it would be a clear violence on the parent or guardian. The violence egreſſus eſt è perſonâ; and death might enſue from non-compliance. If the fear were of ſuch a nature, to avoid the effects of which the true man might kill the perſon, that would be robbery. But that if the threats were of a more peaceable kind, as to ſtrip his eſtate, or the like, it would not be robbery. That none of thoſe conſequences followed in the caſe of threats to diſgrace, as in caſe of threats of violence. That taking by violence or againſt the will of the party were

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not ſynonimous terms. That as to the threat of taking the proſecutor before a magiſtrate, although it were a threat of corporal violence, he did not think it was alone a ſufficient reaſon for diſtinguiſhing the other caſes from the preſent, or to make it a robbery: for if it were not ſufficient to threaten to proſecute, it could not be ſo to lay hold of a man for the purpoſe of proſecuting him; and he did not think it ſo material what the proſecutor apprehended, as what he had reaſon to fear. As to the caſe of the oath, he did not know how to give an anſwer to it: if it were new, he ſhould not think it law; but it was eſtabliſhed. Finally however, after hearing the opinion of the other Judges, he changed his own, and concurred with them that it was robbery. He thought that the threat of immediately taking the proſecutor before a magiſtrate was a ſtrong circumſtance; but he ſtill doubted upon thoſe caſes where there was a demand without any threat or violence.

Willes J. ſaid, he was under leſs difficulty of giving his opinion on this caſe, than he ſhould be to draw the line what threat ſhould or ſhould not be ſufficient in robbery. That there muſt be a felonious taking and an actual or conſtructive violence to conſtitute robbery. As to the felonious taking, the circumſtance of a ſtranger's calling upon a young man unknown to him in the ſtreet to give him a preſent, and threatening him if he refuſed, left no doubt of his felonious intent to take money from the proſecutor, which he obtained by means of ſuch threats. (In alluſion to many caſes which had been urged by the priſoner's counſel, of money obtained from others by threats of various ſorts; as to diſcover to an huſband that the party had committed adultery with his wife; to inform a ſchoolmaſter or military officer of offences committed by a boy or ſoldier, and the like;) he obſerved, that no preciſe anſwer was neceſſary to be given; they muſt depend upon circumſtances, and eſpecially upon the queſtion, Whether any antecedent felonious deſign exiſted in the perſon obtaining money by ſuch means. That as to the queſtion, whether there were any actual or conſtructive violence; the idea of actual violence here muſt be given up, becauſe there was no touching of the proſecutor's perſon. But he thought there was a conſtructive

violence. That the threat of taking him immediately before a magiſtrate was, under thoſe circumſtances, a threat of raiſing the mob on him. That the law was very liberal in conſtructive burglaries for the prevention of the offence; as making uſe of falſe pretences to get into the houſe, or fraudulently ſuing out the proceſs of courts, &c. or prevailing on a child by fraud to open the door. The laying of hands on the party he thought made no difference. That in Jones's caſe, which was very deliberately conſidered, that circumſtance was not relied on: that this was as much a violence in reality on the party: and conſtructive violence ſupplied the place of actual violence. Ch. XVI. § 130. *Fear, of what nature.*

Gould J. ſaid, that he was much diſpoſed to cloſe with the opinion thrown out that money obtained under a terror impoſed by a charge either affecting life or corporal puniſhment, would amount to robbery. Robbery originally meant an actual and violent taking immediately from the perſon; but in proceſs of time the Judges found it neceſſary to ſupply the place of an actual taking from the perſon; and a taking in his preſence was holden to be the ſame thing. That there were many other caſes of conſtructive taking mentioned in Francis's caſe. That when a man *animo furandi* demanded money, whether he ſaid, "give me your money," "make me a preſent," or words of the ſame import, it was robbery. In Crompt. Juſt. 31 *b.* a demand of money, and obtaining it without a weapon or force uſed, was holden to amount to robbery. The grounds were the demand of the offender *animo furandi*, and the apprehenſion in the party's mind that force would follow; which ſupplied the place of actual force. It was comprehended in the language and demand that force would be uſed. If nothing more had been ſaid to the proſecutor than that he had better comply, it would have been a robbery: but beſides, there was a threat to take him before a magiſtrate. That there was no authority which ſaid that a battery was neceſſary: that an illicit demand of money *animo furandi* was an aſſault; and a threat to take a party before a magiſtrate was a threat of actual force. The priſoner threatened to uſe that force which he was maſter of to force and drag the proſecutor before a magiſtrate. Com. Rep. 478.

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Lord Ch. Baron *Skynner* thought there was ſufficient evidence of a felonious aſſault to make the party deliver his money, ſo as to amount to robbery. The attack implied violence, and menaces equal to violence amounted to ſuch in conſtruction of law; and if they anſwered the purpoſe, came within Lord Hale's definition of robbery. That the menace in queſtion was moſt likely to produce the effect of compelling the proſecutor to part with his money: no menace being better calculated to unman the mind as had appeared in ſo many inſtances.

Lord Ch. J. *De Grey* ſaid, that as far as this caſe went he had no difficulty, and beyond that he thought it unneceſſary to give any opinion. It was agreed that actual force or terror was neceſſary to conſtitute robbery. Actual force perhaps there was none in this caſe; but there was terror. He thought it extraordinary that no caſe had decided of what nature the terror muſt be. Mr. Juſtice Foſter had ſaid, there muſt be violence or terror for the ſafety of the perſon, but he did not ſay that the fear muſt proceed from the perſon threatening: If there were a fear for the perſon of the party, he conſidered that ſufficient. That there was no neceſſity for a weapon drawn was a rule well laid down by Hawkins and Lord Hale; and the aſſault ſpoken of by them was evidently a conſtructive and not an actual aſſault. That Lord Hale did not ſeem to think it neceſſary there ſhould be a terror of life. So it appeared from Harman's caſe, where the reaſon alledged why it did not amount to robbery was becauſe the fear aroſe after the purſe was taken; which afforded a fair inference that it was of ſuch a nature as would have conſtituted robbery, if the money had been delivered in conſequence of it. That here the priſoner's intent was clearly felonious, and the mean he employed to obtain the money was a threat of danger to the proſecutor's perſon, if he did not comply. If he refuſed, he was to be carried before a magiſtrate by force. The threat implied that the offender would ſwear to the truth of the charge; the neceſſary conſequence of which was commitment; and if the charge were believed on the trial, the puniſhment was corporal. That it would be dangerous to ſay how far the terror muſt extend, or what was ſuch as might fall *in conſtantem*

Poſt. 726. 736.

ſtantein virum. In caſes where no weapon was uſed there might really be no terror. However the caſe in queſtion clearly amounted to robbery. Suppoſe a threat to ſhoot a man's wife or children at a little diſtance from him, muſt he not be in terror? He reſerved giving any opinion as to the caſes of threats to deſtroy a man's houſe or property; but thought that the expreſſion of a man's not being left a free agent was too looſe and ambiguous. The rule he would adhere to was that expreſſed in Hale and Hawkins. There was no ground, however, to warrant laying it down as a general rule, that the danger muſt ariſe from the perſon threatening: nor could he agree that there muſt be a well grounded terror; though if it were neceſſary, he thought this was ſuch; and he was clearly of opinion that the caſe amounted to robbery. Ch. XVI. § 130. *Fear, of what nature.*

Lord *Mansfield* C. J. was of opinion, that the true nature and original definition of robbery was a felonious taking of property from the perſon of another by force: in which there were three things to be obſerved: firſt, That it muſt be done felonioufly, which went to the intent of the taker. Secondly, That it muſt be taken from the perſon of another. Thirdly, That it muſt be taken by force. That all the reſt which was to be found in the books on this ſubject formed no part of the definition of the offence, but aroſe from legal conſtruction, in order to prevent an evaſion of the law. That as to the felonious intent there could be no doubt: whatever was done afterwards was the mode of executing the intent. That if the conſtruction of the law had been confined to a literal adherence to the definition of robbery, many ways of avoiding it would have been left open. If a man were knocked down and his money taken from him while he remained inſenſible, that would fall within the true definition of robbery, although there could be no fear exiſting in the mind of the party robbed. Again, if the owner threw down his money, or hid it not about his perſon at the time, though it were in his preſence; theſe by conſtruction have been holden to be equivalent to an actual taking from the perſon. So as to the force, conſtructive force was equivalent to actual force. If the owner delivered his money, or were made to ſtand ſtill whilſt the thief took

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it up, that amounted in conſtruction of law to a taking by force; becauſe it was the effect of terror operating on the mind which induced his acquieſcence: and if the property were delivered or ſuffered to be taken by the owner through terror impreſſed on his mind, and in order to get rid of that terror, it was a taking by force, and amounted to robbery. That it was clear that no actual danger to the owner need exiſt: for if a tinder-box or candleſtick were uſed inſtead of a piſtol, it was ſtill robbery. That here the ſtrongeſt perſonal force was uſed. The proſecutor was accoſted by a perſon whom he had never ſeen before: he diſcovered him to be a villain: the ſtranger demanded a preſent: that alone would have been ſufficient; but he went further, and told the proſecutor that *he had better* comply with the demand: that was a threat. Then he threatened he would carry him before a magiſtrate. Was the proſecutor bound to believe that he was in his way to the magiſtrate, or that the priſoner would go no further than he threatened? He thought this was a threat of perſonal injury. The inſtance of terror mentioned in Hale was not ſo ſtrong as this: the purſe was taken there without the owner's knowledge: and upon his afterwards ſeeing it in the thief's hand, and demanding it, the latter ſaid, "Villain, if thou ſpeakeſt of thy purſe, I "will pluck thy houſe over thy ears, and drive thee out of "the country, as I did John Somers." This, ſaid Lord Hale, was ruled not to be robbery; becauſe the *words of menace* were uſed after the taking of the purſe. From thence it was plainly to be inferred, that it was ſuch a menace as, had the purſe been obtained by means of it, would have amounted to robbery. That in truth when a villain came and demanded money, no one knew what he would do: and when it was obtained by threat, it was a conſtructive violence. That it was manifeſt that the mode adopted by the priſoner was a mere evaſion, as he ſuppoſed, of the law, and intended as ſuch: his primary intent was to obtain money by a highway robbery. Ultimately all the Judges held that it was robbery.

Poſt. 736.

O.B. May 1779, Seſſ. Pap. No. 5, p. 3, Serjt. Forſter's MS.

In the May ſeſſion following, Willes J. in giving judgment, after noticing the definition of robbery by Lord Hale and others to the ſame effect, obſerved that the following ingredients

ingredients were neceſſary to conſtitute that offence: 1. A felonious intent, or *animus furandi*. 2. Some degree of violence or putting in fear. 3. A taking from the perſon of another. He obſerved that he ſhould confine himſelf to ſhew that the priſoner's offence came within the above deſcription, as the Judges did not mean to draw the line as to what ſhould or ſhould not conſtitute robbery; and therefore they declined giving an anſwer to the caſes put by the priſoner's counſel; ſaying that every caſe muſt depend upon its own circumſtances; but that the facts in this caſe warranted them in ſaying; as to the firſt point, that there was a felonious intention in the priſoner to rob the proſecutor. Upon the ſecond point, that the putting in fear was not neceſſary to be laid in the indictment; ſo that the fact were charged to be done violently and againſt the will of the party. Nor was the circumſtance of actual fear neceſſary to be proved; but that the law, *in odium ſpoliatoris*, would preſume it. In like manner it had been often holden that actual violence was not neceſſary, but that conſtructive violence was ſufficient: for where ſuch a terror was impreſſed on the mind as did not leave the party a free agent; and in order to get rid of that terror, he delivered his money, it was robbery. It was alſo clear that no actual danger was neceſſary; for a man might commit a robbery without having any offenſive weapon; and though a tinder-box or candleſtick were uſed. For when a villain came and demanded a man's money, no one knew to what length he would proceed. That here the ſituation of the proſecutor was that of a young gentleman accoſted at night in the ſtreet by a ſtranger, whom he had never before ſeen, and muſt have ſuſpected to be a villain, who demanded a preſent. Even that ſeemed ſufficient; but the ſtranger went on and told him that he had better comply, &c. That was a threat of a perſonal injury; for he had every thing to fear, in being dragged through the ſtreets as a culprit charged with an unnatural crime. That, therefore, was a reaſonable fear; which might operate *in conſtantem*, as well as *in meticuloſum virum*. It had, he ſaid, been urged on behalf of the priſoner, that this was a fraudulent extorting, and not a taking by violence. But in many caſes fraud would ſupply the want of

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(1 Leach, 231. more at large)

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violence; as in the caſe of burglary, where breaking was neceſſary to be laid in the indictment, and yet getting admiſſion into a houſe under colour of law or pretence of taking a lodging or buſineſs had been often holden ſufficient evidence of the breaking into the houſe. But the Judges, he obſerved, did not entirely determine this caſe on that ground, but were of opinion that there was proof of a conſtructive violence, which they thought was ſufficient. As to the third point, that there was clearly a taking from the perſon; though a taking in the preſence of the party would have been ſufficient. After citing the above-mentioned caſes of Jones, Brown, and Harrold, he obſerved that in thoſe caſes there was this difference from the preſent, that there was ſome actual violence proved, as taking by the collar or arm: but that the Judges all held that that did not make any material diſtinction, but that ſufficient was proved in this caſe for the jury to find the priſoner guilty of robbery.

Ante, 714, 715.

Staple's caſe, O. B. 1779.

In the October ſeſſions following, John Staples was convicted of a ſimilar offence, and executed.

Hickman's caſe, O. B. July 1783, MS. Buller J. MS. Crown Caſ. Reſ. and MS. Jud.

It is robbery to extort money from a perſon by threatening to charge him with an unnatural crime; though he parted with his money only from fear for his character and from no other fear.

O. B. Feb. 1784, Seſſ. Pap. p. 295. (S. C. 1 Leach, 310.)

Daniel Hickman was indicted for robbing John Millard in St. James's Palace of two guineas. He obtained the money from the proſecutor by charging him with a ſimilar crime as in the foregoing caſes; and by threatening that if he did not make him ſatisfaction he would bring a ſerjeant and a file of men to take him up before a magiſtrate. The proſecutor ſwore that he parted with his money for fear of loſing his character, and that he had no other fear. The jury found the priſoner guilty: but as ſome on the bench thought that this caſe differed from that of Donally, it was reſerved for the opinion of the Judges; who in November 1783 were all of opinion that it was robbery. Aſhhurſt J. afterwards delivered their opinion; that this did not materially differ from the caſe of Donally; for that the true definition of robbery is the ſtealing or taking from the perſon or in his preſence property of any amount, with ſuch a degree of force or terror as to induce the party unwillingly to part with his property: and that whether the terror aroſe from real or expected violence to the perſon, or from a ſenſe of injury to the character, the law made no kind of difference: for to moſt men the idea of loſing their fame and reputation was equally

equally if not more terrific than the dread of perſonal injury. That the principal ingredient in robbery was a man's being forced to part with his property. And that the Judges were unanimouſly of opinion, that upon the principles of law and the authority of former deciſions, a threat to accuſe a man of having committed the greateſt of all crimes was a ſufficient force to conſtitute the crime of robbery by putting in fear.

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§ 131. *On threat to burn houſe.* R. v. J. Aſtley and E. Aſtley, Stafford Sum. Aſſ. 1792, cor. Groſe J. MS. Buller J. and MS. Jud. *The priſoners threatened to bring a mob from Birmingham (then in a ſtate of riot and diſturbance), and burn the proſecutor's houſe down if he did not give them money, which he did under fear of that threat; held robbery.*

No caſe however has gone further than a very recent one of James and Ezekiel Aſtley, who were indicted for robbing Jonathan Grundy. It appeared that the priſoners and a perſon unknown went to a public houſe near Birmingham, during the time of the late riots, which was three or four hundred yards from Mr. Grundy's houſe, early in the morning, where one of them ſaid that they were going up to Mr. Grundy's houſe, "and if he did not turn out the whack, his houſe would be down by two o'clock in the morning;" on which the ſtranger obſerved that he himſelf would do it; that he was the head of the mob, and had 3 or 400 men at command at any time; with other like diſcourſe. They all departed towards Mr. Grundy's houſe; but before they arrived there they ſaw his ſervant at a little diſtance from it, whom they accoſted: James Aſtley telling him he was come as a friend to let Mr. Grundy know that this man (the ſtranger) was the head of the mob, and the firſt man who had entered all the places which were deſtroyed at Birmingham. They then ſeeing Mr. Grundy come out of his houſe, pulled off their hats, and ſhouted Church and King. Mr. Grundy did the ſame, advancing towards the priſoners in much alarm, when the ſtranger accoſted him, ſaying, "I am come out of friendſhip to you, Mr. Grundy, to let you know your houſe is marked to come down to-morrow morning at two o'clock. I am the head of the mob: they are 2000 ſtrong in Birmingham. I muſt have ſomething to make my men drink. I can bring 2 or 300 in an hour's time, or keep them back." Mr. G. ſaid, "As to ſomething to drink, you ſhall have any thing you have a mind for." The ſtranger ſaid, "I muſt have money." Mr. Grundy pulled out half-a-crown from his pocket, and offered it to him; but the ſtranger refuſed it,

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it, and turned away with expreſſions of contempt. Mr. Grundy then aſked what he wanted; the ſtranger replied, he muſt have 20 guineas; and on Mr. Grundy ſaying that he had not ſo much in his houſe, the other told him, that if he did not give him ſomething handſome for his men to drink, his houſe ſhould come down. Mr. Grundy ſaid, that he might have 9 or 10 guineas, which the ſtranger aſked to ſee: and as Mr. Grundy was taking his purſe out of his pocket, James Aſtley told him he might depend upon it that the other man was the head of the mob, and the like ſort of diſcourſe which had paſſed before concerning his power; particularly, that he was the firſt man who had entered every houſe that had been deſtroyed. Mr. Grundy was ſo ſtruck with that expreſſion that he immediately took the money out of his purſe (9 guineas and a half,) which he gave to the ſtranger; who counted it, and demanded to have ſomething to drink. They all went then into Mr. Grundy's houſe, where they had liquor, and in going away aſſured him that he ſhould be protected. Mr. Grundy ſaid, that he was greatly alarmed, but not for his perſon: that no injury was threatened to his perſon: that when he delivered his money his apprehenſion was, that if he had refuſed ſo to do, the priſoners would have gone to Birmingham, and have returned with other perſons, and pulled down his houſe and plundered it before he could have removed his wife, who was in the houſe in great agitation, as the priſoners had threatened, and in the ſame manner as different houſes in Birmingham had been before pulled down. It appeared that the priſoners had a ſmall ſhare of the money afterwards. It was objected on their behalf, that there was no evidence of robbery, inaſmuch as the proſecutor did not deliver his money from any immediate fear of danger to himſelf or his property, but from an apprehenſion of future injury to his houſe by pulling it down. And the counſel for the Crown admitting it to be a new caſe, Groſe J. propoſed to have a ſpecial verdict found; but on account of the priſoners' ſituation, it was agreed that the truth of the evidence ſhould be left to the jury, and if they ſhould find the priſoners guilty, the judgment ſhould be reſpited, and the facts ſubmitted to the Judges for their opinion, whether the evidence amounted to robbery. The jury found

found the priſoners guilty; ſaying that they were ſatisfied that Mr. Grundy did not deliver his money from any apprehenſion of danger to his life or perſon, but from an apprehenſion that if he refuſed, his houſe would at ſome future time be pulled down, as the priſoners and the ſtranger threatned, in the ſame manner as other houſes in Birmingham had been before. In Michaelmas term 1792 a majority of the Judges held this to be robbery (*a*).

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I find a note of a caſe very ſimilar to the above determined by the Judges in 1773. One Simons, who had been a ringleader in the late riots among the tinners in *Cornwall*, came with above ſeventy of his companions to the houſe of one Thomas Rowe, and ſaid, they would have from him the ſame as they had had from his neighbours, which was one guinea, elſe they would tear down his mow of corn and level his houſe. He gave them a crown to appeaſe them; the priſoner ſwore he would have 5 s. more, which Rowe, being terrified, gave him. They then opened a caſk of cyder by force, and drank part of it, and eat his bread and cheeſe, and the priſoner carried away a piece of meat. He was indicted for robbing Rowe of 10s. in his dwelling-houſe by aſſault, and putting him in fear. But there was alſo another count, for putting the proſecutor in fear, and taking from him in his dwelling-houſe a quantity of cyder, pork, and bread: and it was holden robbery in the dwelling-houſe.

R. v. Simons, Eaſt. T. 1773, Serjt. Forſter's MS. *vide* another caſe againſt the ſame priſoner on a different indictment. Ante, p. 712. *On threat to tear down corn and level houſe, &c.*

Another caſe of the like ſort occurred upon the trial of ſome of the rioters in the year 1780. The indictment was for robbing the proſecutor Daking in his dwelling-houſe; into which Daking ſwore that the priſoner William Brown and another man entered; and being aſked by him what they wanted, Brown having a drawn ſword in his hand ſaid with an oath, "Put one ſhilling into my hat, or I have a party that can deſtroy your houſe preſently:" on which the proſecutor gave him a ſhilling. *Another witneſs* preſent ſwore, that the priſoner alſo uſed the expreſſion, that "if he (Daking) would keep the blood within his mouth, he muſt give the ſhilling." The offence was holden to be robbery.

Brown's caſe, O.B. June 1780, cor. Nares J. MS. Buller J.

(*a*) Qu. If the threat of burning down a man's dwelling-houſe by a mob do not in itſelf convey a threat of perſonal danger to the occupiers?

All

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All theſe however were caſes of urgency: the threats were of immediate, or ſpeedy and ſignal miſchief, and the execution of them could not have been impeded by any ordinary prudence or firmneſs, or by any recurrence to the protection of the law. But the following caſe is of another deſcription.

Rex v. Wood and Knewland, O. B. Jan. 1796, cor. Heath J. MS. Jud. *Perſons under pretence of an auction get a woman into a houſe and compel her, by threat of carrying her before a magiſtrate and to priſon for not paying for a lot pretended to have been bid for by her, to pay them* 1 s. *through fear of priſon, and for the purpoſe of obtaining her liberty, but without fear of any other perſonal violence: held dureſs and not robbery.*

Nathaniel Wood and James Knewland were indicted for robbing Sarah Wilſon in the dwelling-houſe of Knewland. Upon the evidence it appeared that as the proſecutrix was paſſing by the door of an auction-room in the Strand, ſhe was ſolicited by Wood to enter, and on her repeatedly declining it he puſhed her into the room, in which about twenty perſons were aſſembled. Here ſhe was much preſſed to bid for ſome articles, which ſhe refuſed, alleging the force which had been put upon her; and attempted to quit the room; but this was prevented by the company: when finding ſhe could not otherwiſe obtain her liberty ſhe bid 6d., and again attempted to depart; but was prevented by Knewland. And the auctioneer having knocked down the goods at 14s. 6d. Knewland ſaid they were her's and he muſt have the money as they were knocked down to her. On her again complaining that ſhe had been forced into the room, and proteſting that ſhe had not the money, Knewland ſaid, if ſhe could not pay all ſhe muſt leave her bundle, or pay half-a-guinea till ſhe could raiſe the remainder. She however refuſed both: on which he ſaid, *that ſhe ſhould go to Bow-ſtreet, and from thence to Newgate, there to be impriſoned till ſhe could raiſe the money.* He then ordered the door to be ſhut and a conſtable ſent for. The priſoner Wood ſoon after entered with a pretended conſtable, who was directed by Knewland to take her to Bow-ſtreet, and from thence to Newgate. The conſtable inſiſted on being paid for his trouble, and threatened to take her away unleſs ſhe paid 1s., Knewland all the while having one hand on her ſhoulder and the other on her bundle. She then paid the conſtable 1s., *being in bodily fear of priſon*, for the purpoſe of obtaining her liberty. Being aſked whether ſhe were not impreſſed with fear by Knewland laying hold of her and her parcel, ſhe anſwered in the negative; ſaying, *that ſhe only parted with her money to avoid being carried to Bow-ſtreet, and from thence*

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to Newgate; and not out of fear or apprehenſion of any other perſonal force or violence. The jury were directed, that if they believed this to be a combination and conſpiracy of the priſoners to procure the money of the proſecutrix under the pretence of an auction, they ſhould find them guilty; which they accordingly did. And the queſtion was reſerved for the opinion of the Judges, Whether the facts ſtated amounted to robbery? In Hilary term 1796, eight Judges being aſſembled, the conviction was holden wrong: conſidering this as the caſe of a ſimple dureſs, for which, according to all the books, the party injured had a civil remedy by action, which could not be if the fact amounted to felony. In the courſe of the debate Groſe J. obſerved, that though he did not agree with the Birmingham caſe, where money obtained by a threat to bring a mob and burn the proſecutor's houſe was holden to be robbery; yet if that were law he could not diſtinguiſh this caſe from it on principle. But Eyre C. J. ſaid, that this was very different from the Birmingham caſe; and nothing more than ſimple dureſs. That the queſtion in ſuch caſes for the jury was, Whether the money were delivered under the impreſſion of terror? If the terror were of ſuch a kind as to diſable the party from reſiſtance, it was a taking by force. But that was not the caſe here. The proſecutrix had a choice of difficulties, and choſe to pay her money rather than undergo the trouble of being carried before a magiſtrate.

(Abſent Athhurſt J. Hotham B. Perryn B. and Buller J.)

R. v Aſtley, ante, p. 729.

In the February following, the opinion of the Judges was delivered by Athhurſt J.; in the courſe of which he obſerved, that there was no reaſon for ſuch a degree of terror in this caſe as to induce the proſecutrix to part with her money; ſhe might have known that having done no wrong, if ſhe had been taken to priſon, the law would have taken her under its protection and ſet her free. And that the law did not allow the fear of being ſent to priſon to be a ſufficient ground of terror to conſtitute a robbery.

Feb. 1796, O. B. Seſſ. Pap. p. 408. (S. C. 2 Leach, 833.)

§ 132. *Where no force, there muſt be terror in fact.*

If the property be not taken by actual violence, but the owner deliver it in conſequence of prior threats, ſuch delivery muſt be enforced by terror actually felt at the time; otherwiſe there is neither actual nor conſtructive violence in

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the taking, and conſequently no robbery. By this principle the caſe before mentioned of delivering money upon a compulſive oath muſt be governed.

Vide ante, f. 129. Reane's caſe, O. B. June, 1794, cor. Perryn B. MS. Jud. *If the property be not taken by violence nor parted with thro' fear, it is no robbery, though there were ſufficient legal and reaſonable ground for fear, as upon a threat to charge one with an unnatural crime.*

James Reane and another were indicted, the one for a robbery on the highway, the other as acceſſary before the fact. The proſecutor depoſed, that on the 19th of May 1794 he met the priſoner Reane, who was an entire ſtranger to him, in the ſtreet, who aſked him for money, and ſaid he was in great diſtreſs. The proſecutor did not give him any thing, and left him muttering ſomething which he did not diſtinctly hear. The next day, meeting Reane again in the ſtreet, he again aſked for money; and being refuſed, told the proſecutor it ſhould be worſe for him. A few days afterwards Reane accoſted the proſecutor again in the ſtreet, and talked of his having committed indecencies with him, and that ſomebody had ſeen it. The proſecutor ſaid he knew not what he meant, and went away. The next day he received a letter from Reané containing the like inſinuation, and mentioning his place of reſidence; in conſequence of which the proſecutor was induced to write to him, appointing to meet him in the ſtreet to hear what he had to ſay. He accordingly met him there, when Reane told that he could prove that he had committed indecencies with him in the Park, and that a third perſon had ſeen it. The proſecutor was ſtruck with the charge. At the ſame time the other priſoner Watkins came up to them and repeated the ſame charge, of which he ſaid he had been the witneſs. The proſecutor then obſerved to them that it was a horrid charge. On which Watkins ſaid, "You have great intereſt with the preſent Government; and I ſhould be glad of a place in the cuſtoms or exciſe, or where clerks were." The proſecutor ſaid he would get him one, and Watkins went away. Reane then ſaid, "You have given that man a certainty; I will have one too." The proſecutor anſwered that he ſhould. The next day Reane told him that he had conſidered what he would have, which was 20 *l.* and a bond for 50 *l.* annually. The proſecutor replied that he could not do it then, but if he would wait a few days he would bring him the money and the bond. He afterwards met Reane and offered him the money, which he would not

not take without the bond; upon which the proſecutor gave him both. This was the ſubſtance of the tranſaction. The proſecutor further depoſed, that at the beginning of the buſineſs he apprehended injury to his perſon or character; but at the time when Reane took the money and bond he had no ſuch apprehenſion, but parted with both for the purpoſe of bringing the priſoners to juſtice, and with that view only. That he did not deliver the money voluntarily, nor ſhould have parted with the money or bond unleſs for the ſeveral applications which had been made to him by the priſoners, but that he was under no fear or apprehenſion when he parted with them. It was objected on the part of the priſoners, that to conſtitute robbery there muſt be violence or fear of danger to the perſon or character, and that ſuch violence or fear muſt exiſt at the time when the money was parted with; which did not exiſt in this caſe: and further, that Reane had been entrapped into the commiſſion of the offence. The priſoners, however, were found guilty; but judgment was reſpited to take the opinion of the Judges upon the caſe. In Trinity term 1794 the Judges (abſent Buller J.) inclined to think that this was not robbery; there being neither violence nor fear at the time when the proſecutor parted with his property. Eyre C. J. obſerved, that it would be going a ſtep further than any of the caſes to hold this to be robbery. The principle of robbery was violence: where the money was delivered through fear, that was conſtructive violence. That the principle he had acted upon in ſuch caſes was, to leave the queſtion to the jury, Whether the defendant had by certain circumſtances impreſſed ſuch a terror on the proſecutor as to render him incapable of reſiſting the demand? Therefore when the proſecutor ſwore that he was under no apprehenſion at the time, but gave his money only to convict the priſoners, he negatived the robbery. That this was different from Norden's caſe, where there was actual violence: for here there was neither actual nor conſtructive violence. A man might be ſaid to take by violence who deprived the other of the power of reſiſtance, by whatever means he did it. And he ſaw no ſenſible diſtinction between a perſonal violence to the party himſelf, and the caſe put by one of the Judges of a man holding

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Ante, 666.

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holding another's child over a river and threatening to throw it in unleſs he gave him money. The Judges, however, thought the matter deſerving of further conſideration. But in Hilary term 1795 (abſent Buller J.), they held the conviction wrong; there being neither actual nor conſtructive violence.

§ 133. *Fear after the taking not ſufficient.* Harman's caſe, Hil. 17 Jac. 2. Roll. Rep. 154. 1 Hale, 534.

Ante, 726.

It is not enough that the fear ariſe after the property is taken. Harman being on horſeback deſired Halfpenny to open a gap for him; and while he was ſo doing, Harman took the opportunity unperceived to pick his pocket of his purſe. Halfpenny turning round and ſeeing the purſe in Harman's hand, demanded it of him, who then menaced Halfpenny (in the manner before mentioned) and went away with the purſe. On an indictment for robbery, the priſoner was holden guilty of ſimple larceny only; the property being obtained by ſtealth, and not by violence or putting in fear; the words of menace being uſed after the taking.

IV. *Of Grand and Petit Larceny and Robbery, and their Puniſhments.*

1. *Grand and Petit Larceny.*

§ 134. *Grand and petit larceny.* 1 Hale, 503. 530. 2 Inſt. 189. 2 MS. Sum. 255. Staundf. 24. b. *Vide* Ld. Lytt. Hiſt. of Hen. 2. 1 vol. qto. 470. 4 Blac. Com. 229, 238. (*Vide* ſt. Weſtm. 1. c. 15 and Weſtm. 2. c. 25.) Hale ut ſupra, & 517. 4 Blac. Com. 237.

In grand larceny the value of the property taken muſt be above 12d. If it be only of that value or under, it is but petit larceny: and in theſe proſecutions the valuation ought to be reaſonable; for when the ſtat. of Weſtm. 2. c. 25. was made, ſilver was but 20d. an ounce, and at the time Lord Coke wrote, it was worth 5s. and it is now higher (*a*). The nature of the offence is the ſame in both; they are both felony, though they differ in the degrees of their puniſhment, and in ſome other particulars. At common law the judgment for grand larceny is of death, but the party may pray the benefit of his clergy, unleſs in caſes

(*a*) I am informed that the average price of late years has been about 5*s.* 3*d.* but in the courſe of the laſt war it roſe at times to about 6*d.* more.

where

where he is ouſted by particular ſtatutes, which have been already noticed: and he ſhall alſo loſe his goods. In petit larceny the offender was only ſubject to whipping, or other corporal puniſhment leſs than death, by which is now underſtood impriſonment: and in this caſe alſo the party forfeits his goods on conviction. But in robbery, whatever be the value, the judgment is of death. But though every larceny include a treſpaſs, yet upon an indictment for larceny, if the taking appear not to be felonious, though amounting to a treſpaſs, the defendant is entitled to a general acquittal.

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3 Inſt. 69. 218. 2 MS. Sum. 257. 1 Hale, 531, 2. 2 Hale, 349. 1 Hawk. ch. 34. ſ. 9. Ante, ſ. 125. Joiner's caſe, O. B. 1664, Kel. 29.

§ 135. *By ſtatute.*

In the puniſhment of grand and petit larceny ſeveral alterations have been introduced by ſtatute, many of which have been already enumerated in ſome of the preceding diviſions of this head of offences. To which may be added in this place the general ſtatute of the 3 W. & M. c. 9. ſ. 2. which enacts, that "if any perſon or perſons be indicted "for any offence, for which by virtue of any former ſtatute "he or they are excluded from the benefit of clergy, if he "or they had been thereof convicted by verdict or confeſſion; if he or they ſhall ſtand mute, or will not anſwer "directly to the felony, or ſhall challenge peremptorily "above 20, or ſhall be outlawed thereupon, he or they ſhall "not be admitted to the benefit of clergy." This does not extend to larcenies which have been ouſted of clergy by ſubſequent ſtatutes.

3 W. & M. c. 9. ſ. 2. *Standing mute, &c. ouſted of clergy, where offender before ouſted on conviction.*

By the ſtat. 18 Eliz. c. 7. ſ. 3. perſons to whom clergy is allowed, may, for their further correction, be impriſoned for any time not exceeding a year, in the diſcretion of the juſtices before whom ſuch allowance is had.

18 Eliz. c. 7. ſ. 3. *Impriſonment not exceeding a year.*

The ſtat. 5 Ann, c. 6. ſ. 2. enacts, "that where any perſon or perſons ſhall be convicted of any theft or larceny, "and ſhall have the benefit of this act allowed thereon, or "ought, by the laws in force before the making of the ſaid "act (*a*), to be burnt in the hand for ſuch offence, ſhall be "burnt in the hand as formerly; and the judge or juſtices, "before whom ſuch offender or offenders ſhall be tried and "convicted, ſhall alſo at their diſcretion adjudge that ſuch

5 Ann. c. 6. *Burning in the hand, and commitment to the houſe of correction.*

(*a*) The firſt ſection of this act repeals the ſtat. 10 & 11 *W.* 3. *c.* 23. which ſubjected certain offenders guilty of thefts or larcenies, who were allowed their clergy, to be burnt on the left cheek inſtead of the hand: which is the act here referred to.

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" offender, &c. shall be committed to some house of correc-
" tion or public work-house within the county, city, &c.
" where such conviction shall be, there to remain for any
" time not less than six months nor exceeding two years, to
" be accounted from such conviction; and such offenders
" shall be there kept at hard labour during such time as shall
" be so adjudged and recorded:" and in case of refusal or neglect to labour as they ought, the master or keeper of such house, &c. is required to give them due correction. By s. 3. in case of escape a method is pointed out of inflicting further punishment on the delinquent. Under this stat. the Judge has a discretion whether he will imprison at all or not.

Ex parte Brownsell, B. R. Tr. 18 G. 3. 2 MS. Sum. 257.

Transportation. 4 Geo. 1. c. 11. s. 1. *Vide* ante, s. 10.

By stat. 4 Geo. 1. c. 11. "where any person or persons shall be
" convicted of grand or petit larceny, or any felonious stealing
" or taking of money or goods and chattels, either from the
" person or the house of any other, or in any other manner,
" and who by law shall be entitled to the benefit of clergy,
" and liable only to the penalties of burning in the hand or
" whipping (except persons convicted for receiving or buy-
" ing stolen goods, knowing them to be stolen), it shall and
" may be lawful for the court before whom they were con-
" victed, or any court holden at the same place, (or holden
" at any other place for the same county, &c. by stat. 6
" Geo. 1. c. 23. s. 1. with the like authority,) if they think
" fit, instead of ordering any such offenders to be burned in
" the hand or whipped, to order that such offenders shall be
" sent to some of his Majesty's colonies and plantations in
" America, for the space of seven years." And the same courts shall have power to make over such offenders by order of court to the use of any person who shall contract for their transportation. And now by stat. 19 Geo. 3. c. 74. s. 1. when any persons are convicted in England or Wales of grand or petit larceny, or any other crime punishable by transportation to America, the Court may, if it thinks fit, order them to be transported to any parts beyond the seas, either in America or elsewhere, not exceeding such terms as they were liable to be transported for to his Majesty's colonies in America.

19 G. 3. c. 74. *Vide* general title *Transportation.*

And

Ch. XVI. § 133. *Grand and petit larceny.*

And by s. 27. of the stat. 19 G. 3. c. 74., "for the more se- "vere and effectual punishment of atrocious and daring offen- "ders, where any male person at any session of oyer and ter- "miner or gaol delivery to be holden for London, or any "county in England, or for the royal franchise of Ely, or at "any great session for the county palatine of Chester, or within "the principality of Wales, shall be lawfully convicted of "grand larceny, or any other crime except petit larceny, "for which he shall be liable by law to be transported to "any parts beyond the seas, it shall and may be lawful for "the court before whom he shall be so convicted, or any "court holden for the same place with like authority, if it "thinks fit, in the place of such punishment by transporta- "tion, to order and adjudge that such person, appearing to "be of competent age and free from any bodily infirmity, "shall be punished by being kept on board ships, &c. (i. e. "the hulks), and be employed in hard labour, &c. in the "Thames, or any other navigable river or port, &c. in Eng- "land appointed by his Majesty in Council, &c. for such term "not less than one year, nor exceeding five years; or in "case such offender shall be liable to be transported for 14 "years, not exceeding seven years, as such court shall or- "der and adjudge."

Hard labour in the hulks.

See other general provisions, tit. *Felony*, &c.

And by the same stat. s. 3. "when any person shall, in any of "the courts beforementioned (*a*), be lawfully convicted of any "felony within the benefit of clergy, for which the party is li- "able to be burned in the hand, it shall and may be lawful for "the court before whom any person shall be so convicted, or "any court holden for the same place with the like authority, "if they think fit, instead of such burning to impose upon "such offender a moderate pecuniary fine: or otherwise it "shall be lawful, instead of such burning (except in case of "manslaughter), to order and adjudge the offender to be "whipped publicly or privately, once or oftener, but not ex- "ceeding three times; such private whipping to be in the "presence of not less than two persons besides the offen- "der and officer who inflicts it; and in case of females, in "the presence of females only;" and such fine or whip-

Fine in lieu of burning;

or whipping in lieu of burning, except in manslaughter.

(*a*) i. e. "at any session of oyer and terminer, or gaol delivery, or at any quar- "ter or general session of the peace, &c. within England, or at any great session "for the county palatine of Chester, or within the principality of Wales."

Ch. XVI. § 135. *Grand and petit larceny.*

ping ſhall have the ſame legal effect as burning. And by ſ. 4. nothing in this act ſhall be taken to abridge the power of the Court to impriſon (as before,) if it thinks fit.

By ſtat. 31 Geo. 3. c. 35. no perſon ſhall be an incompetent witneſs by reaſon of a conviction for petit larceny.

§ 136. *Whether grand or petit larceny.* Ante, 736.

I have before thrown out a hint touching the propriety of the jury's aſſeſſing a reaſonable value on the goods ſtolen; beſides which ſome other circumſtances remain to be noted in drawing the line between grand and petit larceny.

2 MS Sum. 256. 1 Hale, 530, 1. 1 Hawk. ch. 33. ſ. 32, 33. Staundf. 24. b.

If two ſteal goods above the value of 12d. from the ſame perſon at the ſame time, this is grand larceny in both; for it is one entire felony, and both are guilty of the whole. But if the acts of each were ſeveral at ſeveral times, and the goods taken at each time of the value of 12d. only or under, though from the ſame perſon, and put in the ſame indictment; it is only petit larceny in each. And ſo it ſeems the practice is, if one ſteal goods of the ſame perſon at different times, of the value of 12d. or under each time, but altogether exceeding that value: for though ſome writers on the crown law conſider that in ſtrictneſs it amounts to grand larceny, yet that may be well doubted; for as no number of grand larcenies being diſtinct acts, which when added together would make ſuch a ſum as amounts to a capital felony if taken at one time, under certain circumſtances of aggravation; if taken at ſeveral times, will, under the ſame circumſtances, deprive the party of clergy; ſo no number of diſtinct petit larcenies amount to grand larceny. And ſo it was holden in Petrie's caſe, on an indictment on the ſtat. 12 Ann. c. 7. for ſtealing to the amount of 40s. in a dwelling-houſe. The priſoner was ſervant to the proſecutor, and had at different times purloined his maſter's property to a very conſiderable amount; but it did not appear that he had ever taken to the amount of 40s. at any one time: on this ground he was acquitted of the capital part of the charge by the direction of the Court. And the ſame point was ruled by Aſhhurſt J. in a ſubſequent caſe. But it may vary the conſideration, if the property of ſeveral perſons, lying together in one bundle or cheſt, or even in one houſe, be ſtolen together at one time; for there the value of all may

R v. Petrie, O.B. Jan. 1784, 1 Leach, 329.

Rex v. Farley, Surrey Lent Aſſ 1786, 2 MS. Sum. 256. 1 Hal. 531.

be put together so as to make it grand larceny, or to bring it within a statute that ousts clergy, for it is one entire felony.

Ch. XVI. § 136. *Grand and petit larceny.*

§ 137. *Jury to assess the value.*

It was said by Willes C. J. and Chapple J., that upon taking verdicts on indictments for larceny, the jury ought always to be asked as to the value; because if they did not find the value, it would be like taking a verdict in a civil action for the plaintiff, without ascertaining the amount of the damages. For the value found by the jury ascertained the degree of the offence, whether it were grand or petit larceny, or whether it were grand larceny, excluded clergy or not. But that in cases of robbery, burglary, horse stealing, or the like, there could be no occasion to ask the question. Yet Lord Hale says, that if a man could possibly steal a horse worth only 12d.; or break a house in the day time and steal goods thereout only of that value, no person in the house being put in fear, (which would amount to robbery, and so the value be immaterial;) this would be but petit larceny, notwithstanding the stat. 5 and 6 Ed. 6.; for that statute altered not the nature of the offence, but takes away clergy where clergy was allowed before, namely, where the offence was capital, as in the case of grand larceny. So if a man steal only 12d. out of another's pocket *clam et secretè*, there can only be judgment as for petit larceny; although the stat. 8 Eliz. c. 4. takes away clergy from that offence.

Atkinson's case, Lydia Hudson's case, O. B. Dec. 1740, Serjt. Forster's MS.

1 Hale, 531.

Ante, 634.

1 Hale, 531.

Uriah Pearles was indicted for stealing a bay gelding of the value of 23s. 6d. On the evidence it appeared to be a worthless animal turned upon a common, and as the witnesses said, fit only for a dog horse. Mr. Justice Foster recommended it to the jury to find the prisoner guilty to the value of 12d.; which they did; and he was transported.

Pearles's case, Bedford, 13th March 1755, Serjt. Forster's MS.

2. *Robbery.*

§ 138. *Robbery, clergy. Vide* ante, f. 134.

In all cases of robbery from the person, whatever be the value of the property taken, the judgment is of death.

2 Hale, 349.

The stat. 3 W. & M. c. 9. f. 1. enacts, "That all and "every person or persons that shall rob any other person, "or shall comfort, aid, abet, assist, counsel, hire, or com- "mand any person or persons to commit such offence, be-

3 W. & M. c. 9. f. 1.

Ante, p. 629.

Ch. XVI. § 138. *Robbery, clergy.*

"ing thereof convicted or attainted, or being indicted "thereof and standing mute, or not directly answering, or "challenging peremptorily above 20, shall not have the be- "nefit of clergy."

1 Ed. 6. c. 12. s. 10. founded on 23 H. 8 c. 1. s. 3. & 25 H. 8. c. 3. s. 2. Ante, p. 625.

This statute is more general than the stat. 1 Ed. 6. c. 12. s. 10. which confines the description of the offence to "robbing any person in or near the highway," and ousts the principal of clergy, on attainder or conviction, or being indicted or appealed, and found guilty by verdict, or confession on arraignment, or not answering directly, or standing mute. The stat. 4 & 5 Ph. & M. c. 4. which follows the words of the stat. 1. Ed. 6. ousts of clergy the accessaries before (viz. such as "maliciously command, hire, or coun- "sel,") in all cases, including the challenging more than 20, which is omitted in the stat. of Ed. 6.; but which omission is expressly supplied upon indictment by stat. 3 & 4 W. & M. c. 9. s. 3.: and according to the reasoning of Lord Hale and Mr. Justice Foster, which has been before adverted to, the stat. 4 & 5 Ph. & M. will operate to take away clergy from the principal in all cases where it takes it from the accessary. But accessaries after in robbery have the benefit of clergy.

4 & 5 Ph. & M. c. 4. Ante, p. 627.

Ante, 631.

2 Hale, 350.

§ 139. *Robbery, &c. in another county.* 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. 3 W. & M. c. 9.

By the stat. 25 H. 8. c. 3. 5 & 6. Ed. 6. c. 10. s. 2. and 3 W. & M. c. 9. s. 3. persons indicted of larceny in one county, and convicted or attainted thereof, or who upon their arraignment shall stand mute, or challenge peremptorily above 20, or shall not directly answer, shall lose the benefit of clergy, if it appear by evidence or examination at the trial, that the same felonies were robberies or burglaries in another county. These statutes, and the construction thereon, will be set forth at large in another place.

Post. f. 157.

V. *Of Principals, Accessaries, and Receivers.*

§ 140. *Principals and accessaries.*

The same general rules which govern in other cases respecting principals and accessaries apply also to these offences, and are therefore unnecessary to be repeated here. But the case of receivers of stolen goods being peculiar to the subject under

under diſcuſſion, this, and ſome particularities reſpecting principals and acceſſaries in theſe offences, require to be ſpecially noticed in this place. Ch XVI. § 140. *In aggravated larcenies.*

In aggravated larcenies.

Though it be true that in larceny and robbery all thoſe who come to ſteal or rob are principals, although the fact may be only committed by one of them, and are ſubject to the ſame puniſhment; yet it is otherwiſe as to larcenies deprived of clergy under particular circumſtances; ſuch as the caſe of ſtealing privately from the perſon, under the ſtat. 8 Eliz. c. 4. and 39 Eliz. c. 15. for breaking and entering a houſe, &c. and ſtealing to the value of 5 s.; [though in the latter caſe the deficiency is ſupplied by the ſtat. 3 & 4 W. & M. c. 9.:] in which caſes the abettors at the fact are not excluded from clergy, but remain liable only to the penalties of ſimple larceny. Foſt 356. Innis's caſe, 1 Leach, 9. And ſee, ſ. 75. 119.

In petit larceny. 1 Hale, 530. 616. 2 Inſt. 183. 12 Rep. 81. 2 Hawk. ch. 29. Cro. Eliz 750. 2 MS. Sum. 414.

In petit larceny there can be no acceſſaries either before or after (*a*), although it be felony; becauſe it is not ſuch as judgment of death ought by law to be paſſed upon it: but procurers and counſellors are principals as in treſpaſs. With reſpect to grand larceny, the common law reſpecting acceſſaries ſtands upon the ſame footing as in other felonies. But there is a deſcription of acceſſaries after the fact peculiar to larceny which requires diſtinct conſideration; and theſe are

Receivers of ſtolen Goods.

§ 141. *Receivers.* 2 MS Sum 396. 1 Hale, 619. 620. 4 Blac. Com. 38. 132, 3.

At common law no receivers were acceſſaries but ſuch as received or harboured the thief himſelf: the receiving of the ſtolen goods only did not make a man acceſſary, without taking a reward to favour the felon's eſcape. If the owner received back his goods ſimply and without any agreement to favour the felon in his proſecution, it was lawful: but if he received them upon an agreement not to proſecute, or to proſecute faintly, it was called theftbote, and puniſhable by impriſonment and ranſom. But now by ſtat. 3 W. & M. c. 9. ſ. 4. "If any perſon or perſons ſhall buy or receive "any goods or chattels that ſhall be felonioufly taken or "ſtolen from any other perſon knowing the ſame to be "ſtolen, he or they ſhall be taken and deemed an acceſſary 3 W. & M. c. 9. ſ. 4. *Made acceſſaries after the fact to the felony.*

(*a*) Yet in R. v. Reddeard, E. 11 Ann. (De Grey's MS) Powell J. ſaid it was a vulgar error to think that petit larceny, or any felony, capital or not, may not have acceſſaries after the fact. Serjt. Forſter's MS.

Ch. XVI. § 121. *Trial and punishment.*

" or acceſſaries to ſuch felony after the fact, and ſhall incur " the ſame puniſhment as an acceſſary, &c. after the felony " committed."

5 Ann. c. 31. ſ. 5.

The ſtat. 5 Ann. c. 31. ſ. 5. enacts to the ſame effect in general words, " That if any perſon or perſons ſhall receive " or buy *any* goods or chattels that ſhall be feloniouſly taken " or ſtolen from *any other* perſon knowing the ſame to be " ſtolen; or ſhall receive, harbour, or conceal *any* burglars, " felons, or thieves, knowing them to be ſo; he or they ſhall " be taken as acceſſary or acceſſaries to the ſaid felony or " felonies; and being legally convicted by the teſtimony of " one or more credible witneſſes, ſhall ſuffer death as a felon " convict." But though the enacting words are thus general, yet not only the title(1) and other previous proviſions of the act, but alſo the recital to the clauſe in queſtion are all confined to the offences of burglary and houſebreaking; and yet the ſubſequent clauſe, which has words of reference to this clauſe, ſeems always to have been taken generally.

Poſt. ſ. 142.

Tranſportation. 4 G. 1. c. 11. ſ. 1. *Vi.* 1 Eaſt's Rep. 309.

And by ſtat. 4 G. 1. c. 11. " Perſons convicted of receiving " or buying ſtolen goods knowing them to be ſtolen may " be tranſported for 14 years." But they muſt pray the benefit of the ſtatute (*a*). And the felony muſt be ſuch as admits of acceſſaries at law (*b*): for if the principal be convicted of petit larceny only, the receiver of the goods is not puniſhable as an acceſſary, though the words of the ſtatute be general; as was holden in Evans's caſe by all the Judges. But this has been ſince ſupplied by the ſtat. 22 Geo. 3. c. 58. aftermentioned, with certain exceptions.

(*a*) By all the Judges, Se jt. Foſter's MS.

(*b*) 2 MS. Sum. 399 R. v. Evans, O B. 1749, Foſt. 73.

22 Geo. 3. c. 58. Poſt. ſ. 142.

§ 142.

Foſt. 373. MS. Tracy, 126. 1 Hale, 619. 2. MS. Sum. 399.

Before theſe acts the receiving of ſtolen goods was merely a miſdemeanor; but now the miſdemeanor is merged in felony; and therefore a proſecution for a miſdemeanor only would be illegal and improper. This however is to be underſtood of thoſe caſes only where the principal can be come at, ſo as to give an opportunity of convicting the receiver as an acceſſary to the felony. For till the ſtat. 1 Ann. the receiver could not be proſecuted or puniſhed at all before the principal thief was tried and convicted. On this account the receiver, who is generally the employer and patron of the thief,

(1) The title is " an act for the encouraging the diſcovery and apprehending " of *houſebreakers*."

thief, very often escaped with impunity; for if he could keep the thief out of the way, he the receiver could not be tried, and therefore went unpunished. To remedy this inconvenience the stat. 1 Ann. st. 2. c. 9. s. 2. enacts, "that "it shall and may be lawful to prosecute and punish every "such person and persons buying or receiving any stolen "goods, knowing the same to be stolen, as for a misde- "meanor; to be punished by fine and imprisonment; "though the principal felon be not before convicted of the "said felony; which shall exempt the offender from being "punished as accessary, if the principal shall be afterwards "convicted."

Ch. XVI. § 142. *Trial and punishment.*

1 Ann. st. 2. c. 9. s. 2. *Receiver punishable as for a misdemeanor.*

And by stat. 5 Ann. c. 31. s. 6. (immediately following the clause before set forth) it is provided, "that if any such "principal felon cannot be taken, so as to be prosecuted and "convicted for any such offence, yet nevertheless it shall "and may be lawful to prosecute and punish every such "person and persons buying or receiving any goods stolen "by any such principal felon, knowing the same to be "stolen, as for a misdemeanor, to be punished by fine and "imprisonment, or other such corporal punishment as the "court shall think fit; although the principal felon be not "before convicted of the said felony: which shall exempt "the offender from being punished as accessary, if such "principal felon shall be afterwards taken and convicted."

5 Ann. c. 31 s. 6. *Vide* ante, 744.

Upon a conviction under the last mentioned clauses of the statutes of Ann. as for a misdemeanor, the punishment is by imprisonment, or at the discretion of the Judge, as in cases of misdemeanor.

2 MS. Sum. 400. Tipping's case, B. K. E. 11 G. 3.

But the stat. 4 Geo. 1. c. 11. which subjects receivers to transportation for 14 years, does not extend to prosecutions under the statutes of Anne for a misdemeanor only. And where the principal is amenable to justice, the receiver ought still to be prosecuted as an accessary to the felony, and not for a misdemeanor only (*a*).

By all the Judges, 2 MS. Sum. 399.

Post. 373.

(*a*) There is a case of Rex v Pollard and Taylor, M. 11 G. 1. 2 Ld. Ray. 1370. which seems to say, that the prosecutor has an option to prosecute the receiver for a misdemeanor or for a felony, whether the principal can be taken or not. But this is denied by Mr. Justice Foster (p. 374) to be law to that extent. *Vide* the S. C. post. 164.

Jonathan

Ch. XVI. § 142. *Trial and punishment.*

Jonathan Wild was indicted for a misdemeanor in receiving stolen goods, knowing, &c. But it appearing that the principal felons had been convicted and executed, it was objected that this indictment would not lie, being only given by the stat. 5 Ann. where the principal felon cannot be taken and convicted. And Pratt C. J. being of that opinion, the defendant was acquitted.

Jonathan Wild's case, O. B. Sess. bef. East. Term, 5 G. 1 Serjt. Forster's MS. & Select Cas. of Evid. 57.

William Wilkes was convicted on the stat. 3 W. & M. c. 9. s. 4. and 5 Ann. c. 31. s. 6. for receiving stolen goods, as for a misdemeanor: but judgment was respited on a doubt, which was referred to the Judges. For it appeared that Innis, the prosecutor, had been in company with a person in London a few months before, who confessed himself to be the principal felon, and whom he then had an opportunity of taking into custody, but had neglected so to do; because the other had promised to go down to Warwick to give evidence against the receiver: and no opportunity of taking him had since occurred: for though the prosecutor had met the principal again by appointment, yet then he was rescued by some of his companions; and though the prisoner applied immediately for a warrant to retake him, yet he could not afterwards be met with; nor was he in fact taken at the time of finding the indictment. In Trinity term 1774, seven of the Judges against four were of opinion that there ought to be judgment on the conviction. The four thought that where a prosecutor had it once in his power to take the principal, and neglected it, it took the case out of the stat. of Q. Ann. But the seven held that the word *cannot* in the statute must be applied to the time of the prosecution for the misdemeanor, if the principal be then without collusion out of custody, which was the case here. For though the prosecutor had acted weakly and negligently at first, yet when he had the principal a second time in his power, he was rescued by force; and all due diligence was afterwards used to apprehend him.

Wilkes's case, Warwick Lent Ass. 1774, MS. Gould J. MS. Crown Cas. Res. Serjt. Forster's MS. (S. C. 2 Leach, 121.)

Receiver may be indicted for misdemeanor, though prosecutor might once have secured the principal, but neglected to do so.

But now by the stat. 22 G. 3. c. 58. it is enacted, "that "in all cases whatsoever, where any goods or chattels (except lead, iron, copper, brass, bell-metal, and solder,) "(the receiving of which is provided for by stat. 29 Geo. 2. "c. 30. after mentioned,) shall have been feloniously taken

22 G. 3. c. 58. s. 1. *Vide* post 749. and Scott's case, post.

Receiver may be prosecuted for a misdemeanor whether principal be amenable to justice or not.

"or

" or ſtolen; whether the offence of the principal ſhall " amount to grand larceny or ſome greater offence, or to " petit larceny only; (except where the perſon or perſons " actually committing the felony ſhall have been already " convicted of grand larceny or of ſome greater offence;) " every perſon who ſhall buy or receive any ſuch goods and " chattels, knowing the ſame to have been ſo taken or " ſtolen, ſhall be deemed guilty of and may be proſecuted " for a miſdemeanor, and ſhall be puniſhed by fine, im- " priſonment, or whipping, as the court of Quarter Seſ- " ſions, who are hereby empowered to try ſuch offender, " or as any other court before whom he, &c. ſhall be tried " ſhall think fit; although the principal felon or felons be " not before convicted of the ſaid felony; and whether he, " ſhe, or they is or are amenable to juſtice or not. And in " caſes where the felony actually committed ſhall amount to " grand larceny or to ſome greater offence, and where the " perſon or perſons actually committing ſuch felony ſhall " not be before convicted, ſuch offender or offenders ſhall " be exempted from being puniſhed as acceſſary or acceſ- " ſaries if ſuch principal felon or felons ſhall be afterwards " convicted."

Ch. XVI. § 141. *Trial and puniſhment.*

Puniſhable by fine, imprisonment, or whipping.

By ſ. 2. of the ſame act, " one juſtice of the peace on " complaint made before him on oath, that there is reaſon " to ſuſpect that ſtolen goods are knowingly concealed in " any dwelling-houſe, out-houſe, garden, yard, croft, or " other place or places, may by warrant under his hand and " ſeal cauſe every ſuch dwelling-houſe, &c. to be ſearched " in the day-time: and the perſon or perſons knowingly " concealing the ſaid ſtolen goods or any part thereof, or " in whoſe cuſtody the ſame or any part thereof ſhall be " found, he, ſhe, or they being privy thereto, ſhall be " deemed guilty of a miſdemeanor, (and may be brought " before a juſtice of peace, and made amenable to anſwer " the ſame by warrant), and being thereupon convicted by " due courſe of law ſhall be puniſhed in the manner afore- " ſaid." This not to repeal any former law for the puniſh- ment of ſuch offenders.

Power to ſearch for ſtolen goods.

As

Ch. XVI. § 143. *What goods, &c. within the acts.*

As to what shall be considered as "goods and chattels" within these statutes of W. & M. and Ann., it has been holden (*a*) that they include sheep, and by the same reasoning fowls and other animals. And thus the receivers of stolen horses have been brought within these acts, who are not included in the stat. 31 Eliz. c. 12. s. 5. which ousts clergy as well from the accessaries after as before the fact, for the reason before given (*b*). But it has been often determined, and seems now to be settled, that receivers of *money* (*c*) stolen are not within the statutes: For which, this reason may be assigned, that though "*goods and chattels*" may in a large sense take in *money*; yet the intent of these acts only extended to the receipt of such kind of goods and chattels, the property in which, being generally and in its nature capable of being ascertained by outward marks and circumstances, made it more difficult for the thief to dispose of them without the aid of the receiver, by whom he was thus encouraged and protected: whereas money has not in general any such distinguishing marks, and it requires no aid from a receiver to give effect to the theft. And if every receiver of money which happened to have been stolen were liable to be called to account for it, it might be attended with serious inconvenience to the public in their general dealings; it being always difficult, and sometimes impossible, to account for the possession of each individual coin which passes in circulation. In analogy to this a majority of the Judges, in 1787, ruled that *bank notes*, &c. were not within the statutes against such receivers. That was the case of Sadi and Wm. Morris. The indictment charged that Sadi alias George Horn in the dwelling-house of S. S. feloniously stole, &c. one promissory note called a bank note, value 290 *l.* marked, &c. and another note, &c. (of the same sort), the property of the said S. S. against the form of the statute, and that Wm. Morris the aforesaid promissory notes called Bank notes, &c. the same *being the property and chattels* of the said S. S. feloniously received and had, knowing them to be stolen, &c. After conviction it was moved in arrest of judgment on behalf of Morris, that the indictment was defective in charging the notes to be *chattels*; and further that the receiving

§ 143.
(*a*) 2 MS. Sum. 393. cites R. v. Tipping, B. R. East. 11 G. 3. and R. v. Nott, Gloucester Sp. Ass. 1779. and R. v. Morris, O. B. July 1779, cor. Nares and Buller Js.
(*b*) Ante, 616.
(*c*) Serj. Forster's MS. & infra; and Ann Guy's case, O.B. 1782, 1 Leach, 276. So R. v. Davidson, Carlisle, 1766, cor. Bathurst J. 3 Burn's Just. tit. *Larceny*, s. 8. *Vide* ante, 643. same construction on st. 10 & 11 W. 3. c. 23.

R. v. Sadi and Morris, O. B. July 1787, MS. Buller J. MS. Jud. *Vide* S. C. ante, f. 37. (S. C. 2 Leach, 525)

ceiving such notes was not within any of the before-mentioned statutes. These objections were argued by counsel before ten of the Judges, assembled at Serjeant's Inn, in Michaelmas term 1787, when seven of them were of opinion that the conviction was bad, on the ground that the receiving bank notes knowing them to be stolen was not within the statute of William, which they thought attached only on the receivers of property which came under the denomination of *goods and chattels* at the time when the act passed: and one of the seven thought that such would have been the construction if the stat. 2 G. 2. had preceded that of King William. But two of the Judges were strongly of a different opinion, to which the other also inclined; considering it as a consequence of law, that where a new felony was created by statute, it drew after it all the incidents of felony at common law, and therefore included accessaries before and after. They thought that the st. 2 G. 2. c. 25. s. 3. having made it felony to steal bank notes in like manner as if the party had stolen goods of the like value, the receivers of such property stood in the like predicament as the receivers of other goods and chattels. And the opinion of the majority in the above-mentioned case seems to have been much shaken by the resolution of all the Judges in Dean's case and other cases which have been before mentioned, wherein bank notes by the operation of the stat. 2 G. 2. were holden to be within the stat. 12 Ann. c. 7. against stealing money, goods, &c. to the value of 40*s.* out of the dwelling-house.

Ch. XVI. § 143. *Of what goods and chattels.*

(Absent Lord Mansfield, and Ld. C. B. Eyre.)

Ante, 743.

(Gould and Ashurst J.) (Ld. Lough-borough.)

Dean's case, 1795. Ante, f. 88. and Sess. Pap. for May 1796, p. 615.

§ 144. *Lead, iron, brass, copper, bell-metal, solder.*

The Legislature have also made particular provisions in a variety of cases against receivers of certain stolen goods. It was before remarked that certain articles were excepted out of the general statute of the 22 G. 3. c. 58.: these were before specially provided for by the st. 29 G. 2. c. 30. s. 1. which reciting that "whereas the practice of stealing lead, iron, "copper, brass, bell-metal, and solder, fixed to, or lying or be-"ing in or upon houses, out-houses, mills, warehouses, work-"shops, and other buildings, areas, yards, vaults, gardens, "orchards, or other places; and also the stealing of such "materials from ships, barges, lighters, boats, and other "vessels and craft, upon navigable rivers, in ports of entry "or discharge, creeks and docks belonging thereto, and also "from

29 G. 2. c. 30. s. 1. Ante, 746.

Ch. XVI. § 144. *Lead, iron, braſs, copper, bell-metal, ſolder.*

" from off wharfs, quays, and other places, is become a " great and notorious evil, by reaſon of the difficulty in ap- " prehending and convicting the thieves, and the ſtill greater " difficulty of diſcovering and convicting the buyers or re- " ceivers thereof; which buyers or receivers are the prin- " cipal cauſe of the commiſſion of ſuch thefts; and in re- " gard that the ſaid offences are committed in ſuch cloſe " and clandeſtine manner that there can be no witneſs to " the ſame, but ſuch who is or are the partakers of the of- " fence: and whereas if the buyers and receivers of lead, " iron, copper, braſs, bell-metal, or ſolder, knowing or " having reaſonable cauſe to ſuſpect the ſame to be ſtolen " or unlawfully come by, were made original offenders, " and puniſhable independent of the apprehenſion and con- " viction of the thief; and if the apprehending, proſecut- " ing, and convicting the offenders in both kinds were ren- " dered more eaſy and ſpeedy, it might more effectually " tend to the diſcovery and ſuppreſſion of the ſaid of- " fences:" For remedy whereof enacts, " That from and " after the 1ſt of October 1756, every perſon who ſhall buy " or receive any lead, iron, copper, braſs, bell-metal, or " ſolder, knowing the ſame to be unlawfully come by; or " ſhall privately buy or receive any ſtolen lead, iron, copper, " braſs, bell-metal, or ſolder, by ſuffering any door, win- " dow, or ſhutter to be left open or unfaſtened between " ſun-ſetting and ſun-riſing for that purpoſe; or ſhall buy " or receive the ſame, or any of them, at any time, in any " clandeſtine manner from any perſon or perſons whatſo- " ever; ſhall, being thereof convicted by due courſe of law, " although the principal felon or felons has not or have not " been convicted of ſtealing the ſame, be tranſported for " 14 years to any of his majeſty's colonies or plantations in " America according to the laws in force for the tranſporta- " tion of felons."

By ſ. 11. This ſhall not extend to repeal any former law then in being for the puniſhment of ſuch offenders: but no offender puniſhed by this act ſhall be afterwards liable to be puniſhed by any ſuch former law.

Though the firſt-mentioned clauſe inflicts ſo ſevere a puniſhment, and the act itſelf is framed in ſuch a manner

as to beget a doubt whether the legiſlature did not conſider the receiver as a felon, yet it is not ſo enacted in terms. It ſpeaks indeed of the *principal felon*; and the offender is directed to be tranſported according to the laws in force for the tranſportation of *felons*, on conviction by due courſe of law; and in the ſubſequent clauſes other minor offences of the ſame deſcription are ſpecifically declared to be *miſdemeanors*; and by a ſubſequent clauſe all ſuch miſdemeanors are ſubjected to a ſummary juriſdiction, and puniſhable by forfeitures and corporal puniſhment; and the ſame conſtruction ſeems to be implied in the act of the 21 G. 3. after mentioned: yet I believe the practice has been to indict upon the ſtat. 29 G. 2. as for a miſdemeanour (*a*); that is, I preſume where the principal has not been before convicted of felony: for by the general act of 3 W. 3. c. 9. before mentioned, receivers in general are made acceſſaries after the fact to the felony; and by ſtat. 4 G. 1. c. 11. they may be tranſported for 14 years. But the ſtat. 29 G. 2. c. 30. ſ. 1. is more comprehenſive in the deſcription of the offenders than the general acts againſt receivers. In the caſe of lead, iron, &c. affixed to buildings and ſtolen therefrom, the receiver is by the ſtat. 4 G. 2. c. 32. and 21 G. 3. c. 26. before mentioned, made liable to the ſame puniſhment as if he had ſtolen the goods; which is tranſportation for 7 years, or impriſonment and whipping.

Ch. XVI. § 144. *Lead, iron, pewter, &c.*

Vide R. v. Wyer, poſt. ſ. 145.

Vide Exception in ſtat. 22 G. 3. c. 58. ante, 747. and Wild's caſe, ante, 746. Ante, 743.

Ante, ſ. 30.

By the ſtat. 21 G. 3. c. 69. entitled an act to *explain and amend* the ſtat. 29 G. 2. reciting that act, and that it had been found by experience to prevent many felonies being committed in reſpect to the ſeveral articles mentioned therein, but that the metal called *pewter* not being included, evil diſpoſed perſons had taken advantage thereof, and the ſtealing of *pewter pots* and *other pewter*, and the buying and receiving the ſame, knowing the ſame to be ſtolen, was become a great evil; enacts, "That after the 1ſt of *Auguſt* "1781, every perſon who ſhall buy or receive any *pewter-* "*pot or other veſſel*, or *any pewter* in any form or ſhape "whatever, knowing the ſame to be ſtolen or unlawfully "come by; or ſhall privately buy or receive any ſtolen pew- "ter by ſuffering any door, window, or ſhutter to be left open

21 G. 3. c. 69. *Pewter.*

(*a*) So it appeared on inquiry in R. v. Stott: *vide* poſt.

"or

Ch. XVI. § 144. *Lead, iron, &c.*

" or unfaſtened between ſun-ſetting and ſun-riſing for that " purpoſe; or ſhall buy or receive the ſame at any time in " any clandeſtine manner from any perſon or perſons what- " ſoever; ſhall, being thereof convicted by due courſe of " law, although the *principal felon or felons* has not or have " not been convicted of *ſtealing* the ſame, be tranſported in " like manner as *other felons* are directed to be tranſported by " law for any time not exceeding ſeven years, or be kept " and detained in priſon and therein kept to hard labour for " any time not exceeding three years nor leſs than one year; " and within that time (if ſuch court think fit) ſuch offender " and offenders ſhall be once or oftener but not more than " three times publicly whipped."

Vide ante, and R. v. Wyer, poſt. ſ. 145.

29 G. 2. c. 30. ſ. 1. *Not confined to raw materials.*

It has been conſidered by ſome, that the act of the 29 Geo. 2. c. 30. relates to the metals therein mentioned only in their common or raw ſtate, as contradiſtinguiſhed from wrought goods: and upon the argument of the caſe of Rex v. Stott in Hil. 39 Geo. 3. B. R. a caſe of Rex v. Scott was cited to that effect, as having been ſo ruled by the late Mr. Serjt. Adair, Ch. J of Cheſter; in which he ſaid that the ſame conſtruction had been put upon the ſtatute during his experience at the Old Bailey while Recorder of London. But there is great difficulty in adopting ſuch a conſtruction; for the ſtatute ſpeaks of lead, iron, &c. *fixed to houſes*, which cannot be in their raw ſtate; but the metals muſt in ſome reſpect be manufactured, and be either bars, bolts, rails, ſheets of lead, or in ſome other form capable of a more ſpecific deſcription than merely lead, iron, or copper. That this ſtatute was not intended to be ſo confined ſeems evident from the preamble of the ſtat. 21 Geo. 3. c. 69. before ſet forth, from whence it muſt be collected that the Legiſlature conſidered that if *pewter* generally had been mentioned in the former law, it would have reached the caſe of receiving pewter pots after they were ſtolen; and that *pewter* was a ſufficient deſcription of every thing manufactured out of it, and that the form or ſhape did not make that deſcription leſs proper. Beſides, it is difficult to conceive that the ſtat. 29 Geo. 2. ſhould recite that the practice of ſtealing iron, &c. had become a great and notorious evil, if it meant only to prevent the ſtealing ſuch pieces of iron, &c. to which no appropriate name or deſcription could be given.

MS poſt. Scott's caſe, Cheſter Sp. Aſſ. 1798.

The

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The case of Rex v. Stott above mentioned was an indictment for a misdemeanor (removed by writ of error from the Quarter Sessions) for receiving stolen iron knowing it to be stolen, which was laid in the indictment as so many "pieces of iron called strokes," so many "pieces of iron," and so many "pieces of iron called horse-shoes," of a value under 1s. on which judgment of imprisonment for a year had been given by the court below after conviction. The Court of B. R. gave no direct opinion on the subject; but intimated great doubt, Whether, as the general act of the 22 G. 3. c. 58. expressly excepted *iron*, any other judgment could be passed than that of transportation directed by the stat. 29 G. 3. c. 30.? on which doubt the prisoner's counsel waved any further prosecution of the writ of error.

Rex v. Stott, Hil. 39 Geo. 3. B. R. MS.

§ 145. *Receivers of goods stolen on the Thames.*

By st. 2 G. 3. c. 28. "Every person who shall buy or receive "any part of the cargo or loading of, or any goods, stores, "or things of or belonging to any ship or vessel in the river "Thames, knowing the same to be stolen or unlawfully "come by; or shall privately buy or receive any such goods "stores, or things, or any part of such cargo or loading, by "suffering any door, window, or shutter to be left open or "unfastened between sun-setting and sun-rising for that pur-"pose; or shall buy or receive the same or any of them at "any time in any clandestine manner from any person or "persons whomsoever, shall, being thereof convicted by due "course of law, although the principal felon or felons, "offender or offenders, has or have not been convicted of "stealing or unlawfully procuring the same, be transported "for 14 years, &c.

2 G. 3. c. 28. s. 12. *Vide* post. tit. *Malicious Mischief—Cutting Cordage, &c. with intent to steal.*

Vide st. 39 & 40 Geo. 3. c. 87. for preventing depredations on the River, s. 16. & 21.

The offence of receiving under this act has been deemed felony, though the statute do not declare so expressly in this clause. For by the stat. 3 & 4 W. & M. c. 9. s. 4. receivers of stolen goods may be prosecuted as felons: and though by stat. 1 Ann. st. 2. c. 9. s. 2. they may be punished as for a misdemeanor where the principal felon is not convicted; yet s. 14. of the 2 G. 3. seems to consider them as felons; for thereby any person stealing or unlawfully receiving such stolen goods knowingly shall, on discovering two other offenders, be entitled to a pardon for all *such felonies*. In truth the statute seems only to have made the receiving of the goods under

R. v. Wyer, 2 Term Rep. 77.

Ch. XVI. § 145. *Receivers on the Thames.*

ſuch circumſtances evidence of their having been received by the party, knowing them to have been ſtolen.

39 & 40 G. 3. c. 87. ſ. 22. *Such receivers ſhall plead inſtanter.*

However the legiſlature ſeem to have conſidered it only as a miſdemeanor by the ſt. 39 & 40 G. 3. c. 87. ſ. 22. which, reciting that "whereas by the ſt. 2 G. 3. c. 28. perſons guilty of "certain offences are puniſhable by tranſportation for 14 "years, but the ſaid offences not being by the ſaid act de- "clared to be felony, the trial thereof may in all caſes be "put off by means of a traverſe to the next Seſſions after "the finding of the bill of indictment for the ſame, and the "offender be in the mean time bailed (*a*), whereby juſtice has "been in many inſtances eluded;" for remedy thereof enacts, "that from the paſſing of the act whenever any in- "dictment ſhall be found againſt any perſon for any of the "ſaid offences, the perſon ſo indicted ſhall plead to the ſaid "indictment without having time to traverſe the ſame, as "is uſual in caſes of miſdemeanors."

§ 146. *Receivers of jewels, plate, &c.* 10 G. 3. c. 48.

By ſtat. 10 G. 3. c. 48. "Every perſon who ſhall buy or "receive any ſtolen jewel or jewels, or any ſtolen gold or "ſilver plate, watch, or watches, knowing the ſame to have "been ſtolen; ſhall, in all caſes where ſuch jewel or jewels, "or gold or ſilver plate, ſhall have been feloniouſly ſtolen, "accompanied with a burglary actually committed in the "ſtealing the ſame, or ſhall have been feloniouſly taken by "a robbery on the highway, be triable as well before con- "viction of the principal felon in ſuch felony and burglary, "or robbery, whether he ſhall be in or out of cuſtody, as "after his conviction. And if any perſon ſo buying or re- "ceiving ſuch jewel or jewels, or gold or ſilver plate, ſhall "be convicted thereof, he ſhall be adjudged guilty of fe- "lony, and tranſported for 14 years," &c.

R. v. E Moſes, Kent Sum. Aſſ. 1783, cor. Gould J. MS. Gould and Buller J. MS. Crown Caſ. Reſ. and MS. Jud. *A cornelian ſeal is a jewel within the act.*

Under this ſtatute Eſther Moſes was indicted at the Kent Summer aſſizes 1783, before Gould J. The indictment ſet forth a robbery of Mr. Drummond in the highway of a watch, gold watch-caſe, a red cornelian ſeal ſet in gold, and a white one, alſo ſet in gold; and then charged that the priſoner received the ſtolen watch, jewels, and gold plate above mentioned, knowingly, againſt the form of the ſtatute. The

(*a*) In R. v. Wyer (ante) the Court refuſed to bail the priſoner, on the ſuppoſition that the offence was felony.

words "*watch or watches*" are omitted in the latter part of the ſtatute, which makes the felony. And the priſoner being convicted, judgment was reſpited to take the opinion of the Judges, Whether the receiving a gold watch and ſuch ſeals, knowing them to have been ſtolen, (being taken by robbery in the highway,) were a felony within the act? This was firſt debated by all the Judges in Mich. term 1783, and adjourned for further conſideration to Hil. term ſucceeding; when ten Judges preſent (and one abſent and concurring) held the priſoner well convicted. Some thought the gold in the watch might be deemed *plate;* but others thought that was not the meaning of the ſtatute: but all held that the *ſeals* ſet in gold came under the word *jewels.*

Ch. XVI. § 146. *Jewels, plate, watches, &c.*

§ 147. *Receivers of other goods before ſpecified.*

Alſo the receiving of other ſtolen goods knowingly has been before noticed, in treating of ſeveral particular deſcriptions of property, the ſtealing of which has been prohibited under ſpecial penalties; amongſt theſe may be reckoned the receiving of ſtolen woollen, linen, and cotton goods, and garden plants, &c. So by ſtat. 25 G. 2. c. 10. every perſon who ſhall buy or receive any wad or black cawke, otherwiſe black lead, ſo unlawfully taken and carried as is therein before mentioned, ſhall be deemed guilty of felony, and on conviction be ſubject to all the pains and penalties which perſons can or may by the laws and ſtatutes of the realm be ſubject to for buying or receiving ſtolen goods or chattels knowingly.

Ante, f. 28. &c.

Black lead.
Ante, f. 32.

§ 148. *Naval and military ſtores of the King.*

Having before touched upon the offence of ſtealing naval and military ſtores, it remains now to conſider how the law ſtands with regard to receivers of ſuch ſtores.

By the ſtat. 9 & 10 W. 3. c. 41. reciting, "that notwithſtanding the laws made for preventing the ſtealing "and embezzling of the King's ſtores of war and naval "ſtores, thoſe frauds, theſts, and embezzlements are frequently practiſed, and the convicting of ſuch offenders is "rendered difficult and impracticable, by reaſon it rarely "happens that direct proof can be made of ſuch offenders "immediate taking, embezzling, or carrying away any of his "majeſty's ſaid ſtores, &c. out of his ſtorehouſes, docks,

9 & 10 W. 3. c. 41. made a public act by ſt. 1 G. 1. ſt. 2. c. 25. f. 14.
Ante, f. 53.

Ch. XVI § 148. *King's stores, &c.*

" ships, &c. or other places for keeping and preserving the " same, but only that such goods are marked with the King's " mark, and found in the custody and possession of the person " accused, &c.; for preventing such embezzlements for the fu- " ture, and for the more effectual execution of the laws already " in force against such embezzlements and thefts," it is enact- ed, " that it shall not be lawful for any person or persons what- " soever, other than persons authorised by contracting with " the King's principal officers or commissioners of the navy, " ordnance, or victualling-office, for his majesty's use, to " make any stores of war or naval stores whatsoever with " the marks usually used to and marked upon his majesty's " said warlike and naval or ordnance stores; viz. any cord- " age of three inches and upwards, wrought with a white " thread laid the contrary way; or any smaller cordage, " viz. from three inches downwards, with a twine in lieu of " a white thread, laid to the contrary way as aforesaid; or " any canvas wrought or unwrought, with a blue streak in " the middle; or any other stores with the broad arrow, by " stamp, brand, or otherwise; upon pain that every such " person or persons who shall make such goods so marked as " aforesaid, not being a contractor with his majesty's prin- " cipal officers or commissioners of the navy, ordnance, or " victuallers, for his majesty's use, or employed by such " contractor for that purpose as aforesaid, shall for every " such offence forfeit such goods, and 200l. with costs of " suit, one moiety to the King, the other to the informer, to " be recovered by action of debt," &c.

No warlike or naval stores, except for the king's use, shall be made with the king's marks.

By s. 2. " Such person or persons in whose custody, pos- " session, or keeping such goods or stores marked as afore- " said shall be found, not being employed as aforesaid; and " such person or persons who shall conceal such goods or " stores marked as aforesaid, being indicted and convicted " of such concealment, or of the having such goods found " in his custody, possession, or keeping, shall forfeit such " goods and 200l., together with the costs of prosecution; " one moiety to the King, and the other to the informer, to " be recovered as aforesaid, and shall also suffer imprison- " ment till payment and performance of the said forfeiture; " unless such person shall upon his trial produce a certificate

Persons in whose custody such marked stores are found, and who shall conceal the same, shall forfeit such goods and 200 l. and be imprisoned till payment. Vide post. 9 G. 1. c. 8. s. 3. and *vide* s. 149. Cole's case.

" under the hand of three or more of the King's officers or " commiſſioners of the navy, ordnance, or victuallers, ex- " preſſing the numbers, quantities, or weights of ſuch goods " as he or ſhe ſhall then be indicted for, and the occaſion " and reaſon of ſuch goods coming to their hands or poſ- " ſeſſion." Ch. XVI. § 148. *King's ſtores &c.*

In addition to which, by the ſtat. 9 Geo. 1. c. 8. ſ. 3. " Every perſon lawfully convicted of having in their cuſtody " any timber, thick ſtuff, or plank, marked with the broad " arrow, by ſtamp, brand, or otherwiſe, or of concealing " any timber, &c. ſo marked, ſhall ſuffer, forfeit, and pay " as for having, keeping, or concealing any other warlike, " naval, or ordnance ſtores, contrary to the ſaid act" of King William. *Extended to timber, &c. by* 2 G. 1. c. 8.

By ſ. 4. of the ſt. 9 & 10 W. 3. the commiſſioners, &c. may ſell and diſpoſe of any of the ſaid ſtores ſo marked, &c. as theretofore, and the buyers may keep and enjoy the ſame without incurring the penalty of this or any other law, on producing a certificate or certificates under the hand and ſeal of three or more of the ſaid principal officers or commiſſioners, &c. that they bought ſuch goods from them, or from ſuch perſon or perſons as bought the ſaid ſtores from the ſaid officers, &c. at any time before ſuch ſtores were found in their cuſtody: " in which certificate or certificates the quantities of ſuch " ſtores ſhall be expreſſed, and the time when and where " bought of the ſaid commiſſioners; who, or any three or " more of them, are directed to give to ſuch perſon or per- " ſons who deſire the ſame, and have bought or ſhall here- " after buy any of the ſaid ſtores, within 30 days after the " ſale and delivery of the ſaid ſtores ſo ſold, or to be ſold as " aforeſaid." 9 & 10 W. 3. c. 41. ſ. 4. *Commiſſioners may ſell ſuch ſtores with certificates.*

Sect. 8. provides that the King's ſtores may be lent by the ſaid officers or commiſſioners of the navy, or any chief commander of any of the King's ſhips at ſea, to any merchant ſhip in diſtreſs or otherwiſe, as before the act, in caſe ſuch goods be reſtored with all poſſible conveniency, and the perſons ſo borrowing have ſuch certificate as aforeſaid, which ſuch officers, &c. are empowered to grant. *Or lend them to ſhips in diſtreſs.*

Ch. XVI. § 148. *King's ſtores, &c.*

1 Geo. 1. ſt. 2. c. 25. made perpetual by 9 G. 1. c. 8. ſ. 3. *Summary juriſdiction to inquire and puniſh for ſmall embezzlements, &c.*

By ſtat. 1 Geo. 1. ſt. 2. c. 25. ſ. 3. "The ſaid principal officers and commiſſioners of the navy, or any one or more, ſhall have power to inquire, and by warrant under hand and ſeal to empower any perſon to ſearch for the ſame in all places, in like manner as juſtices of peace may do in caſe of felony, and puniſh the offenders by ſuch fine and impriſonment as aforeſaid, (*i. e.* (by ſ. 1.) ſuch fine not exceeding 20s., and impriſonment not exceeding a week, either in the next gaol, or in the cuſtody of the meſſengers attendant on them; and they may alſo diſcharge the party from ſuch fine and impriſonment; and on non-payment of the fine ſo impoſed and not remitted, may impriſon the offender till payment, or otherwiſe cauſe him to be ſent to the houſe of correction next to the place where the offence was committed, there to be kept to hard labour for two months; which fine is to be paid to the clerk of the cheſt at Chatham;) the value of the goods ſo embezzled or filched away not exceeding 20s. and cauſe the goods to be brought in again: and if the offence require a ſeverer puniſhment, then they, any one or more of them, may commit ſuch offender to the next gaol, or to the cuſtody of their meſſenger aforeſaid, till he enter into recognizance with ſurety or ſureties, according to the nature of the offence, to appear and anſwer to the ſame in the court of Exchequer or other court where the King ſhall queſtion him for the ſame within a year following, on proceſs duly ſerved for that purpoſe on ſuch offender."

By ſ. 4. a ſummary juriſdiction is given to certain officers to inquire of and puniſh embezzlements of ſuch ſtores under the value of 20s.

9 G. 1. c. 8. *Juriſdiction to mitigate penalty and commit to gaol, &c.*

The ſtat. 9 Geo. 1. c. 8. ſ. 4. (referring to the offences deſcribed in the 2d ſect. of the ſtat. 9 & 10 W. 3. c. 41. and the additional proviſion made by the 3d ſect. of the ſaid act 9 Geo. 1. c. 8.) provides, "That it ſhall and may be lawful for any judge, juſtice, &c. before whom any offender ſhall be convicted of any of the offences before recited, enacted, or mentioned in this act, to mitigate the penalty for the ſame as they ſhall ſee cauſe, and to commit the offender ſo convicted to the common gaol of the county, &c. where the offence ſhall be committed until payment of the penalty and forfeiture impoſed by this or the ſaid

"former

" former act, or mitigated as aforesaid; or to punish such Ch. XVI 1748.
" offender corporally, by causing him to be publicly *King's stores, &c.*
" whipped or committed to some public workhouse, there to
" be kept to hard labour for six months, or a less time, in the
" discretion of such judge," &c. And by s. 5. " Where any *Dispute as to title*
" dispute shall arise between the persons on whose informa- *to penalties.*
" tions or oaths any offender or offenders against this or the
" former act shall be prosecuted and convicted, touching any
" right or title to any of the forfeitures or penalties before
" mentioned, or any part thereof, the judge, justice, or justices
" before whom such offender or offenders shall be convicted
" shall examine the matter, and finally determine the same."

Then the statute 17 Geo. 2. c. 40. s. 10. reciting 17 G. 2. c. 40.
the act of the 9 & 10 W. 3. c. 41. against the mak- s. 10.
ing, &c. stores with the King's marks, and the having such stores so marked, or concealing the same, or the additional stores mentioned in the 3d sect. of the stat. 9 Geo. 1. c. 8. and reciting also the last-mentioned clauses (s. 4 & 5.) of the same act; and that " whereas some doubts had arisen
" touching the method of trial and punishment of offenders
" against the said recited acts, whether they might be in-
" dicted and tried for the offences in the said acts mention-
" ed, and whether any judge, or justice of assize, or justices
" of peace at sessions might hear, try, and determine the
" same, and on conviction set such fine or mitigate the
" same, &c.; or whether such offenders, in order for re-
" covering the said forfeitures and penalties inflicted by the
" said act could only be proceeded against by action of
" debt, &c. in some court of record at Westminster; by
" reason of which doubts offenders indicted, &c. had escaped,
" &c.; for explaining the same, declares and enacts, that it
" shall and may be lawful for any judge, justice, or justices *Judges at the assizes or justices of peace at quarter sessions may impose any fine not exceeding 200 l. for any offence within the 9 & 10 W. 3. c. 41. and 9 G. 1. c. 8. and may mitigate, &c. or in lieu thereof inflict corporal punishment.*
" at the assizes, or justices of peace at the general quarter
" sessions, &c. to hear, try, and determine by indictment or
" otherwise *all or any* the crimes or offences mentioned in
" the said recited acts, and that the judge, &c. before whom
" such offenders shall be indicted or tried and convicted of
" all or any the offences in the said recited acts mentioned,
" may impose any fine not exceeding 200 l. on such offender
" or offenders, one moiety to the King, and the other to the
" informer; and may mitigate the said penalty and forfei-
" tures inflicted by the said recited acts, or either of them;

Ch. XVI. § 148. *King's ſtores, &c.*

" and to commit the offenders ſo convicted and fined to the " common gaol of the county or place where the offence " was committed until payment thereof, &c.; or in lieu " thereof, to puniſh ſuch offenders in the premiſes corpo- " rally, by cauſing them to be publicly whipped, and com- " mitted to ſome houſe of correction or public workhouſe, " there to be kept to hard labour for three months, or leſs " time, in the diſcretion of ſuch judge," &c.

Bland's caſe, Mich. 1793. B. R. 2 Leach, 678.

Under this clauſe it is holden, that the Court have authority to adjudge the offender to ſuffer corporal puniſhment, although he be ready and offer to pay the penalty of 200l.

§ 149.

39 & 40 Geo. 3. c. 89. intitled " An act for the " better prevent- " ing the embez- " zlement of his " majeſty's na- " val, ordnance, " and victualling " ſtores."

The ſtat. 39 & 40 Geo. 3. c. 89. ſ. 1. reciting the acts of the 22 Car. 2. c. 5. 9 & 10 W. 3. c. 41. 9 Geo. 1. c. 8. and 17 Geo. 2. c. 40. ſ. 10. and that " notwithſtanding the " penalties and puniſhments inflicted by the ſaid recited " acts, the ſtealers, embezzlers, and receivers of his majeſ- " ty's warlike and naval, ordnance, and victualling ſtores " had greatly increaſed, ſo that it had become neceſſary to " make ſome *further* and more effectual proviſion for pre- " venting their wicked practices in future;" enacts, " that " from and after the paſſing of the act (28th July 1800) " every perſon or perſons, (ſuch perſon or perſons not being " a contractor or contractors, or employed as in the ſaid " recited act of the 9 & 10 W. 3. is mentioned,) who ſhall " willingly or knowingly *ſell or deliver*, or cauſe or procure " to be ſold or delivered, to any perſon or perſons whomſo- " ever; or who ſhall willingly or knowingly *receive or have* " in his, her, or their cuſtody, poſſeſſion, or keeping, any " ſtores of war, or naval, ordnance, or victualling ſtores, " or any goods whatſoever marked as in the ſaid re- " cited acts are expreſſed, or any canvas marked either " with a blue ſtreak in the middle, or with a blue ſtreak " in a ſerpentine form, or any bewper, otherwiſe called " buntin, wrought with one or more ſtreaks of raiſed " tape; (the ſaid ſtores of war, or naval, ordnance, or " victualling ſtores, or goods above mentioned, or any of " them being in a raw or unconverted ſtate, or being new, " or not more than one-third worn); and ſuch perſon or " perſons who ſhall *conceal* ſuch ſtores or goods, or any of " them, marked as aforeſaid, ſhall be deemed *receivers of* " *ſtolen goods* knowing them to have been ſtolen, and ſhall " on

Every perſon (not a contractor, &c.) who ſhall knowingly, &c. ſell or deliver, or receive or have in his poſſeſſion any naval, ordnance, or victualling ſtores, &c. in a raw ſtate, or new, or not more than one third worn, and ſuch perſon who ſhall conceal the ſame, ſhall be deemed a receiver of ſtolen goods knowingly, and be tranſported for 14 years;

" on conviction be tranſported beyond the ſeas for the term " of fourteen years, in like mannet as other receivers of " ſtolen goods are directed to be tranſported, &c. unleſs " ſuch perſon or perſons ſhall upon their trial produce a cer- " tificate under the hands of three or more of his majeſty's " principal officers or commiſſioners of the navy, ordnance, " or victualling, expreſſing the numbers, quantities, or " weights of ſuch ſtores or goods as they ſhall then be in- " dicted for, and the occaſion or reaſon of ſuch ſtores or " goods coming to their hands or poſſeſſion." Ch. XVI. § 149. *King's ſtores, &c.*

unleſs he produce a certificate from the commiſſioners, &c. accounting for ſuch ſtores.

By ſ. 2. " Such perſon or perſons, (not being a contractor " or contractors, or employed as aforeſaid,) in whoſe cuſto- " dy, poſſeſſion, or keeping any of the ſaid ſtores called " canvas, marked with a blue ſtreak in a ſerpentine form, " or bewper, otherwiſe buntin, wrought as above mention- " ed, ſhall be found, (ſuch canvas or bewper, &c. not being " charged to be new, or not more than one-third worn,) " and all and every perſon and perſons, who ſhall be con- " victed of any offence contrary to ſo much of the ſaid re- " cited act of the 9 & 10 W. 3. as relates to the making, or " the having in poſſeſſion or concealing any of his majeſty's " warlike, or naval, or ordnance ſtores, marked as therein " ſpecified, ſhall, beſides forfeiting ſuch ſtores and 200 l. " and coſts as therein mentioned, be corporally puniſhed by " pillory, whipping, and impriſonment, or by any or either " of the ſaid ways and means, in ſuch manner and for ſuch " ſpace of time as to the judge or juſtices before whom ſuch " offender, &c. ſhall be convicted ſhall ſeem meet, &c. " Provided that ſuch judge or juſtices may mitigate the ſaid " penalty of 200l. as they ſhall ſee cauſe."

Perſons in whoſe cuſtody ſhall be found canvas or buntin marked, &c. (not being new, &c.) or who ſhall be convicted of any offence contrary to 9 & 10 W. 3. relating to warlike ſtores, &c. ſhall beſides the forfeiture of 200l. (which may be mitigated) ſuffer corporal puniſhment.

" Provided (ſ. 3.) that nothing in this act, or in the ſaid " recited act of the 9 & 10 W. 3. ſhall be deemed to ex- " tend to exempt from the operation of this or the ſaid re- " cited act any perſon or perſons being contractors, or " employed as in the ſaid laſt-mentioned act is mentioned, " except only ſo far as concerns ſtores or goods, marked as " aforeſaid, which ſhall be *bonâ fide* provided, made up, or " manufactured by ſuch perſons, or by their order, and " which ſhall not have been before delivered into his majeſ- " ty's ſtore; unleſs, having been ſo delivered, they ſhall have " been

Not to exempt contractors, except as to ſtores bonâ fide made up for his majeſty, or returned to them.

Ch. XVI. § 149. *King's ſtores, &c.*

" been ſold or returned to ſuch perſons by the commiſſion-
" ers of his majeſty's navy, ordnance, or victualling re-
" ſpectively."

§ 150. *Defacing marks on the King's ſtores, felony, and tranſportation for 14 years.*

Sect. 4. enacts, " That if any perſon or perſons ſhall,
" from and after the paſſing of this act, (28th July 1800,)
" wilfully and fraudulently deſtroy, beat out, take out, cut
" out, deface, obliterate, or eraſe, wholly or in part, any of
" the marks in the ſaid act of the 9 & 10 W. 3. or in this
" act mentioned, or any other mark whatſoever denoting the
" property of his majeſty, &c. in or to any warlike or naval,
" ordnance, or victualling ſtores; or cauſe, procure, employ,
" or direct any other perſon or perſons ſo to do, for the
" purpoſe of concealing his majeſty's property in ſuch
" ſtores; ſuch perſon or perſons ſhall be deemed guilty of
" felony, and ſhall, on conviction, be tranſported to parts
" beyond the ſeas for 14 years in like manner as other
" felons," &c.

§ 151. *Perſons not tranſported for a firſt offence againſt this act, and guilty of a ſecond offence againſt this or the ſtat. 9 & 10 W. 3. ſhall be tranſported for 14 years.*

By ſ. 5. " If any perſon or perſons hereafter convicted of
" any offence contrary to this act, for which he ſhall not
" have been tranſported; or, contrary to the ſaid recited act
" of the 9 & 10 W. 3., ſhall be guilty of a ſecond offence,
" either contrary to that act or the preſent act, which
" would not otherwiſe, as the firſt offence, ſubject them to
" tranſportation, and ſhall be thereof legally convicted;
" ſuch perſon or perſons ſhall, by judgment of the court
" wherein they ſhall be ſo convicted, be tranſported for
" 14 years, in like manner as other offenders," &c.

Returning from tranſportation before term expired, death.

By ſ. 6. " Perſons ſo tranſported, &c. returning into any
" part of Great Britain or Ireland before the expiration of
" the term, &c. ſhall ſuffer as felons, and have execution
" awarded againſt them, as perſons attainted of felony,
" without benefit of clergy."

Court may commute tranſportation for corporal puniſhment and fine.

" Provided (ſ. 7.) that it ſhall and may be lawful for the
" court before whom any offender ſhall be indicted and
" convicted of all or any of the crimes or offences herein
" before mentioned to be puniſhable with tranſportation, to
" mitigate or commute ſuch puniſhment, by cauſing the
" offender or offenders to be ſet on the pillory, publicly
" whipped, fined, or impriſoned, or by all or any one or
" more

" more of the said ways and means, as such court in its " discretion shall think fit; one moiety of which fine (if any " imposed) shall be to his majesty, &c. and the other moie- " ty to the informer; and also to order such offender or " offenders to be imprisoned until such fine be paid." Ch. XVI. § 151. *King's stores.*

§ 152. *Reward on discovery.*

By s. 8. persons discovering to the navy, ordnance, or victualling boards, or apprehending, or first informing against any offenders guilty of stealing or embezzling such stores, or of any of the offences mentioned in the said stat. 9 & 10 W. 3. or in the present act before mentioned, which shall not be prosecuted in the summary way after prescribed, shall on conviction receive, for every such offence so discovered, 20l. over and above any share of penalty or fine they may be entitled to as informers, so as the same do not amount to more than 20l.; or, (if amounting to more than 20l.,) shall fail to be paid by the offenders on whom inflicted for three calendar months after conviction, or if they be detained by sentence of imprisonment, for three calendar months next after the expiration of such sentence. And by s. 9. disputes respecting the title to such rewards shall be determined by any of the commissioners of the navy, &c. on oath before the same, or any justice of peace. By s. 10. the commissioners of the navy, &c. shall cause such reward to be paid by the treasurer of the navy or ordnance, on producing a certificate under the hand of the clerk of assize, or other proper officer of the court before whom such offenders shall be tried, certifying the conviction, and that the informer's share of any penalty or fine inflicted on such offender or offenders does not amount to more than 20l.; or if amounting to more, hath failed to be paid by such offender or offenders for three months after conviction, or if imprisoned by sentence for three months after the expiration of such imprisonment; for which certificate the said clerk, &c. shall charge no more than 5s.

Search warrants.

By s. 11. any commissioner of the navy, &c. or justice of peace may grant warrants to search houses, ships, &c. in the day-time, and in case any stores or goods marked as before mentioned shall on such search be found, to cause the same and the offenders to be brought before such commissioner or justice of peace, to be bound over, &c.

The

Ch. XVI. § 152. *King's ſtores.*

Summary juriſdiction.

The act then proceeds to create ſeveral miſdemeanors; amongſt others, the not accounting to the ſatisfaction of ſuch commiſſioner or juſtice for the poſſeſſion of ſuch ſtores, &c. which miſdemeanors are determinable in a ſummary manner before the ſame perſons: and by ſ. 18. authority is given to any ſuch principal officer or commiſſioner of the navy, &c. or juſtice of peace, &c. "to hear and determine any complaint againſt any perſon (not being a contractor or employed as aforeſaid) for unlawfully ſelling or delivering, or cauſing or procuring to be ſold or delivered, or for receiving or having in their cuſtody, poſſeſſion, or keeping, or for concealing, any ſtores of war, or naval, ordnance, or victualling ſtores or goods marked as aforeſaid, of any value, in the whole not exceeding 20s." And on conviction (founded on complaint exhibited within three calendar months after the offence committed) they are empowered to inflict a fine on the offender, to be levied as therein mentioned; from which an appeal is given to the Quarter Seſſions. And then,

Not to prevent proſecutions againſt receivers, &c. ſo as the party be not twice puniſhed.

By ſ. 24. it is "enacted and declared, that nothing "therein before contained, which gives to any commiſſioner "or juſtice, &c. authority to hear and determine offences "in a ſummary way, ſhall extend to prevent parties accuſed "of ſelling or delivering, or of having in their cuſtody, "poſſeſſion, or keeping, or of receiving or concealing, any "of the ſtores marked as above mentioned, under the value "of 20s. from being proſecuted as receivers of ſtolen goods "under this act, or for unlawfully having the ſame in their "cuſtody, or concealing the ſame, under the ſaid acts of the "9 & 10 W. 3. 9 Geo. 1. or 17 Geo. 2. in any court of "record, oyer and terminer, or otherwiſe, as they might "have been if no ſuch authority had been given; or to "take away from any perſon or court any power, &c. or "authority which they had for the hearing and determining "of ſuch offences, in caſe no authority to hear and determine the ſame in a ſummary way had been given; ſo as "that the ſame perſon ſhall not be puniſhed twice for the "ſame offence."

By the 29th ſect. the proviſions of the act are extended to Scotland.

The

Ch. XVI. §153. *What a receiving or having, &c.*

The moſt general queſtion which occurs upon this body of ſtatutes is, What ſhall be ſaid to be a receiving or having? or in other words, Who is liable to be indicted as a receiver within the meaning of the ſeveral proviſions?

§153. *What a receiving or having in poſſeſſion.* Ante, 743, 4, 746.

As to what general evidence ſhall be ſaid to conſtitute a receiver under the ſtatutes of William and Anne, and 22 Geo. 3. c. 58. it is to be obſerved, that the words of thoſe acts are in the diſjunctive, "receive *or* buy." Therefore it follows, that in order to conſtitute a receiver generally ſo called, it is not neceſſary that the goods ſhould be actually purchaſed by him: neither does it ſeem neceſſary that the receiver ſhould have any intereſt whatever in the goods: it is ſufficient if they be in fact received into his poſſeſſion in any manner *malo animo*, as to favour the thief; or without lawful authority expreſs, or to be implied from circumſtances; as in the caſe after mentioned, determined by Mr. Juſtice Foſter on the Weſtern circuit. This diſtinction is however to be noted, that in general caſes under the ſtatutes laſt mentioned the receiver is averred to have knowledge that the goods were ſtolen; which may be collected from circumſtances; and by Lord Hale, the buying goods at an under value is preſumptive evidence that the buyer knew they were ſtolen. But under the ſtatutes for protecting the King's ſtores, the King's mark denotes the original owner-ſhip; and there the *onus probandi* lies on the party to account ſatisfactorily for his poſſeſſion according to the regulations preſcribed, otherwiſe the bare fact of poſſeſſion concludes him. But even here the preſumption of the *malus animus* ariſing from the bare fact of poſſeſſion may be rebutted by circumſtances, as in the following caſe:

Vide 1 Hale, 619, 620.

A widow woman was indicted before Mr. Juſtice Foſter upon the Weſtern circuit on the ſtat. 9 & 10 W. 3. c. 41. for having in her cuſtody divers pieces of canvas marked with the King's mark in the manner deſcribed in the act; ſhe not being a perſon employed by the commiſſioners of the navy to make the ſame for the King's uſe. The canvas was marked as charged in the indictment, and was clearly proved to be ſuch as was made for the uſe of the navy, and to have been found in the defendant's cuſtody. The defendant

Foſt. Append. 439. edit. of 1792. *One became poſſeſſed on the death of her huſband of canvas ſtores, which had been purchaſed by him in his lifetime at a public ſale, and had lain many years made up into houſhold furniture, but no*

Ch. XVI. § 153. *What a receiving or having, &c.*

fendant did not attempt to shew that she was within any exception of the act, as being a person employed to make canvas for the use of the navy: nor did she offer to produce any certificate from any officer of the crown, touching the occasion and reason of such canvas coming into her possession. Her defence was, that when there happened to be in his majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons intrusted with the stores to make a public sale of them in lots, larger or smaller as best suited the purpose of the buyers; and that the canvas produced in evidence, which happened to have been made up long since, some for table-linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant, and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen. This sort of evidence was strongly opposed by the counsel for the crown, who insisted, that, as the act allows of but one excuse, the defendant, unless she could avail herself of that, could not resort to any other. That if the canvas were really bought of the commissioners, or of persons acting under them, there ought to have been a certificate taken at the time of the purchase; and the second section admits of no other excuse. But the Judge was of opinion, that though the clause of the statute, which directs the sale of these things, had not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seemed to exclude any other excuse for those in whose custody they should be found: yet still the circumstances attending every case which might seem to fall within the act ought to be taken into consideration; otherwise a law calculated for wise purposes might by too rigid a construction of it be made a handle for oppression. There was no room to say, that this canvas came into the possession of the defendant by any act of her own. It was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. Things of that kind had been frequently exposed to public sale;

evidence was given of any certificate of such sale being lawful as required by stat. 9 & 10 W. 3. or of any excuse allowed by the act; yet the possession being by act of law without fraud; held not within the penalty of the statute.

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sale; and though the act pointed out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities had been purchased at one sale, had used the caution suggested to them by the act. And if the defendant's husband really bought the linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury; and directed them, That if, upon the whole evidence, they were of opinion, that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her; and she was accordingly acquitted.

Cole's case, Winchester, March 1801. cor. Le Blanc J. MS. Jud. *Difference between receiving and having in possession.*

An indictment charged that Thomas Cole, on the 28th January 1801, unlawfully, willingly, and knowingly did *receive and have* in his custody, possession, and keeping certain naval stores of the King, being all marked with the broad arrow, he not being a contractor, &c. against the statute, &c. The jury found the prisoner guilty; but said they did not find that he *received* the stores after the 28th July 1800, but only that he had them in his possession after that day. Judgment was thereupon respited to take the opinion of the Judges; a majority of whom inclined to think, that the statute was to be construed in the disjunctive, and the word *or* (receive *or* have) not to be taken as *and*: but because of the disagreement of some, and that the case was not likely to occur again, the prisoner, on the finding of the jury, was recommended to mercy. It seemed however to be agreed that the case was not within the stat. 9 & 10 W. 3. c. 41. because the goods were not charged to have been found in the prisoner's possession.

§ 154. *Difference between receiving and stealing.*

Some cases have turned on the distinction between the cases of accomplice and receiver in general.

Rex v. Dyer and Disting, Exeter Sum. Aff. 1801. cor. Graham B. MS.

Dyer and Disting were indicted for stealing a quantity of barilla, the property of M. Hawker. The fact appeared to be, that the barilla was on board a Swedish ship at Plymouth consigned to Hawker. That Hawker employed Dyer, who was the master of a large boat, for the purpose of bringing

Ch. XVI. § 154. *Who a receiver or accomplice.*

ing the barilla on ſhore; and Diſting, together with ſeveral others, were employed as labourers in removing the barilla after it was landed to Hawker's warehouſes. The jury found, that while the barilla was in Dyer's boat, ſome of his ſervants without his privity, conſent, or participation ſevered ſome of the barilla from the reſt where it was ſtowed, and removed it to another part of the boat, where they concealed it under ſome rope. But they alſo found, that Dyer afterwards aſſiſted the other priſoner and the perſons on board who had before ſeparated this part from the reſt *in removing it from the boat for the purpoſe of carrying it off.*

It was objected for the priſoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or acceſſary after the fact. But Graham B., before whom the trial was had, thought, that ſo long as the barilla remained in the boat the offence as to Dyer could not be ſaid to be complete, but that it was one continuing tranſaction to the time of the complete carrying off of it from the boat: and he directed the jury accordingly; who found the fact ſpecially as above ſtated, and that both the priſoners were guilty. Graham B. however deferred paſſing ſentence till the next day, when he ſaid that after conſultation with the other Judge (Mr. Juſtice Le Blanc) he was now fully ſatisfied that his opinion was well founded. That though for ſome purpoſes, as with reſpect to thoſe concerned in the actual taking and ſeparation, the offence would have been complete, as being an aſportation in point of law, yet with reſpect to Dyer, who joined in the ſcheme before the barilla had been actually taken out of the boat, where it was properly depoſited for the purpoſe of being landed, and who aſſiſted in the act of carrying it off from thence, it was one continuing tranſaction, and could not be ſaid to be completed till the removal of the commodity from ſuch place of depoſit; and Dyer having aſſiſted in the act of carrying it off, was therefore guilty as principal.

Rex v. Atwell, and O'Donnell and others, at the ſame time.

Another caſe aroſe out of the ſame tranſaction. The reſt of the barilla was lodged in M. Hawker's warehouſe. While it was there, it appeared that ſeveral perſons employed as labourers or ſervants by him entered into a conſpiracy to ſteal ſome of it; and accordingly ſome of them who had acceſs to the warehouſe removed a parcel of it nearer to the door

door than it was before in the course of the morning; and about nine at night these persons together with Atwell and O'Donnell, who had in the mean time agreed to purchase it of the others, came to the warehouse yard, and assisted the others, who took it out of the warehouse, in carrying it away from thence. They being all indicted as principals in the felony, the same objection was made as before, that these two were only receivers or accessaries after the fact, the felony being complete before their participation in the transaction: but after the like consideration in this case as in the other, Graham B. said, that so long as the goods remained in the warehouse, which was the lawful place of their deposit, although to some purposes, as to those who severed this parcel from the rest for the purpose of stealing it, and more conveniently removing it afterwards, the felony might be said to be complete; yet it was a continuing transaction as to those who joined in the same plot before the goods were finally carried away from the premises: and all the defendants having concurred in or been present at the act of removing them from the warehouse wherein they were lawfully deposited, they were all principals. And accordingly all the prisoners, found guilty on both indictments as principals in the two several transactions, received sentence of transportation for seven years.

Ch. XVI § 154. *Who a receiver or accomplice.*

Taking a Reward to help to stolen Goods.

§ 155 *a.* *Taking a reward to help to stolen goods.*

This is a kindred offence growing in truth out of the character of a receiver of stolen goods: for these confederates of the thieves, who are difficult to be discovered, frequently dispose of the goods stolen to the owners for a reward, under the pretence of helping them again to their stolen goods: it is therefore further provided by the st. 4 G. 1. c. 11. that whenever any person taketh money or reward, directly or indirectly, under pretence or upon account of helping any person or persons to any stolen goods or chattels; every such person so taking money or reward as aforesaid (unless such person doth apprehend or cause to be apprehended such felon who stole the same, and cause him to be brought to trial for the same, and give evidence against him) shall be guilty of felony, and suffer

4 G. 1. c. 11. s. 4.

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"the pains and penalties of felony, according to the nature "of the felony committed in ſtealing ſuch goods, and in "ſuch and the ſame manner as if ſuch offender had himſelf "ſtolen ſuch goods and chattels in the manner and with "ſuch circumſtances as the ſame were ſtolen."

Reward, &c.

By ſtat. 6 Geo. 1. c. 23. ſ. 9. whoſoever ſhall diſcover, apprehend, and proſecute to conviction of felony without benefit of clergy any offender againſt the above law ſhall be entitled to a reward of 40l. for every ſuch offender, and a certificate, &c.

O. B. 1725. 4 Blac. C. m. 132. Poſt. ſ. 166.

On the above ſtatute of the 4 G. 1. the noted Jonathan Wild was convicted and executed; the principal felon being examined as a witneſs on the part of the crown.

Rex v. John Drinkwater, O. B. 1740. Leach, 18. *Whether offender triable after death of principal before conviction.*

Yet in Drinkwater's caſe it was doubted, the principal felon being dead, and not having been convicted of the offence, whether the perſon receiving the reward to help to the ſtolen goods could be convicted. The report ſays that the court (conſiſting, as appears, of Ld. C. J. Lee and Denton J.) conceived it to be a caſe of very great importance and of the firſt impreſſion, and therefore reſerved it for the opinion of the Judges; which was never publicly communicated; but the priſoner, after remaining ſome time in goal, was diſcharged. This reſult of the matter, if accurately ſtated, ſeems to import that the objection prevailed: but it is very queſtionable whether the doubt there could have been founded on the ground ſuggeſted in the argument of the counſel for the priſoner, which was that the principal was not convicted, nor the record of ſuch conviction given in evidence to ſupport the allegation of her having committed the felony. For, without inquiring whether the principal had been previouſly convicted in Jonathan Wild's caſe, the very terms of the ſtatute itſelf preclude the ſuppoſition of a conviction of the principal being a neceſſary preliminary to the trial and puniſhment of the offender under this ſtatute; for it ſtates that the offender, "*unleſs he doth apprehend or cauſe* "*to be apprehended the felon who ſtole the goods, and cauſe ſuch* "*felon to be brought to his trial for the ſame, and give evidence* "*againſt him*, ſhall be guilty of felony, *and ſuffer the pains* "*and penalties of felony*," &c. I therefore rather preſume that the true ground of the doubt entertained there was,

It ſeems he had not. *Vide* the argument in Drinkwater's caſe, 1 Leach, 21, 2.

becauſe

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becauſe by the death of the principal the ſtipulated condition had become impoſſible to be performed without any default of the defendant.

In proſecutions on this ſtatute it ſeems proper to aver that the defendant had not apprehended or cauſed to be apprehended the principal, &c. ſuch reſervation being in the enacting clauſe, and part of the deſcription of the offence.

Advertiſing a Reward for the Return of ſtolen Goods, &c.

§ 155. (*b*) 25 Geo. 2. c. 36. *Advertiſing a reward for ſtolen goods, &c. ſubjected to forfeiture.*

In furtherance of the laws againſt receivers, and to check as much as poſſible their nefarious traffic, it is alſo enacted by ſtat. 25 Geo. 2. c. 36. ſ. 1. "That any perſon "publicly advertiſing a reward, with no queſtions aſked, "for the return of things which have been ſtolen or loſt, "or making uſe of any words in ſuch public advertiſement "purporting that ſuch reward ſhall be given or paid, with"out ſeizing or making inquiry after the perſon producing "ſuch things ſo ſtolen or loſt; or promiſing or offering in "any ſuch public advertiſement to return to any pawn"broker or other perſon who may have bought, or advanced "money by way of loan upon, ſuch things ſo ſtolen or loſt, "money ſo paid or advanced, or any other ſum of money "or reward for the return of ſuch thing; and any perſon "printing or publiſhing ſuch advertiſement; ſhall reſpec"tively forfeit the ſum of 50l. for every ſuch offence to "any perſon who will ſue for the ſame."

VI. *Of the Trial, Indictment, Appeal, Evidence, Verdict, and Clergy.*

§ 156. *Trial.* 2 Hale, 173.

The offences of larceny and robbery, like all others, muſt be tried in the ſame county or juriſdiction wherein they were committed. In aſcertaining which it is neceſſary to advert to two leading principles from which certain deviations which will be noticed are exceptions.

1 Hale, 507, 8. 536. 2 Hale, 162. 1 Hawk. ch. 33. ſ. 9. 2 Hawk. ch. 25. ſ. 38. 2 MS. Sum. 25. 439.

1. That the poſſeſſion of goods ſtolen by the thief is a larceny in every county into which he carries the goods; becauſe the legal poſſeſſion ſtill remaining in the true owner, every moment's continuance of the treſpaſs and felony

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amounts to a new caption and aſportation. And therefore if one ſteal goods in the county of A. and carry them into the county of B. he may be indicted or appealed of larceny in the latter county; though he can only be charged with robbery in the county where the force or putting in fear was.

Stealing at ſea.
1 Hawk. ch. 33. ſ. 9.
3 Inſt. 113.
13 Co. 53.
2 MS. Sum. 285. 419.

To this however there are ſome exceptions; as where the original taking is ſuch whereof the common law cannot take cognizance; as of goods obtained by theft or robbery at ſea, and afterwards carried into ſome county: in which caſe the common law gives no juriſdiction to inquire of the felony.

In Scotland.

Rex v. Anderſon and others, Carliſle Sum. Aſſ. 1763. cor. Gould J. and afterwards before all the Judges in Nov. 1763. MS. Crown Caſ. Reſ. 16. 2 MS Sum. 251. 4:0, 1.

And the ſame exception prevailed till lately in caſes where the original taking was in Scotland: it was ruled that a felon in ſuch caſe could not be indicted in Cumberland where he was taken with the goods. But now by the ſtat. 13 Geo. 3. c. 31. ſ. 4. "If any perſon or perſons having ſtolen or "otherwiſe feloniouſly taken money, cattle, goods, or other "effects in either part of the united kingdom (i. e. of Scot-"land and England) ſhall afterwards have the ſame money, "&c. or any part thereof in their poſſeſſion or cuſtody in "the other part of the united kingdom, it ſhall and may "be lawful to indict, try, and puniſh ſuch perſon or per-"ſons for theft or larceny in that part of the united king-"dom where they ſhall ſo have ſuch money, &c. in their "poſſeſſion or cuſtody; as if the ſaid money, &c. had been "ſtolen in that part of the united kingdom."

13 G. 3. c. 31. ſ. 4.

Receivers.

And by ſ. 5. "if any perſon or perſons in either part of "the united kingdom ſhall hereafter receive or have any "money, cattle, goods, or other effects, ſtolen or other-"wiſe feloniouſly taken in the other part of the united "kingdom, knowing the ſame to be ſtolen or otherwiſe "feloniouſly taken; every ſuch perſon or perſons ſhall be "liable to be indicted, tried, and puniſhed for ſuch offence "in that part of the united kingdom where they ſhall ſo "receive or have the ſaid money, &c. in the ſame manner "to all intents and purpoſes as if the ſaid money, &c. had "been originally ſtolen or otherwiſe feloniouſly taken in "that part of the united kingdom."

Wales. Wreck.
26 G. 2. c. 19. ſ. 8. ante, ſ. 86.

Alſo in the caſe of plundering the effects of any veſſel wrecked or in diſtreſs, which is ouſted of clergy by the ſtat. 26 Geo. 2. c. 19. before adverted to, it is enacted, ſ. 8.

"That

"That if the fact be committed in Wales, then the pro- Ch. XVI § 156. *Wales. Wreck.*
"secution shall or may be carried on in the next adjoining "English county," in the manner therein mentioned.

Parry and Roberts were indicted on this statute in Salop for an offence committed in the isle of Anglesea; and the objection was taken that Cheshire was "the next adjoining "English county," (of which evidence was given;) and therefore that the trial ought to have been there and not in Salop. It was observed that there was a difference between the penning of the statute 26 H. 8. c. 6. s. 6. which gives the general jurisdiction to the English Judges to try offences committed in Wales, and that of the 26 Geo. 2. c. 19. s. 8. in question; for the former of those statutes says, "that the justices of gaol delivery, &c. in the shire or "shires of England *where the king's writ runneth* next ad- "joining to the lordship, marches, or other place in Wales "where the offence was committed shall have full power "and authority," &c. But the stat. 26 Geo. 2. omits the words "*where the king's writ runneth.*" But all the Judges in Nov. 1774 were of opinion that it was no mistrial: that "the next adjoining English county" in the latter statute meant, as in the former, "where the king's writ runneth;" namely, that the offence should be tried by an English judge and jury: and that Chester was not to be considered as an English county within either of those acts.

Rex v. Parry and Roberts, Salop Sum. Ass. 1774. MS. Gould J. (*Vide* S. C. 1 Leach, 125.) *Salop, and not Cheshire, is "the "next adjoining "English county" to Anglesea, within the meaning of the statute, being the next where the King's writ runs.*

With the like view of securing an impartial trial the 8th section of the same act of 26 Geo. 2. c. 19. gives an option to the prosecutor, even where the fact is committed in an English county, to prosecute in the adjoining English county. Ante, p. 649.

§ 157. *Aggravated larcenies.*

2. The second leading principle which governs the trial of these offences is, that where clergy is ousted on circumstances of aggravation, such circumstances must *all* be proved to have happened within the county in which the offender is tried; otherwise the fact of the larceny only being established in that county, he will be entitled to clergy.

To this an exception is furnished by the stat. 25 H. 8. c. 3. (revived and confirmed by the stat. 5 & 6 Ed. 6. c. 10.) which, reciting (s. 1.) "that felons and robbers committed "divers

25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. *Goods obtained by burglary or robbery in another county.*

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1 Hale, 519.

" divers heinous robberies and burglaries in one ſhire, and " conveyed the ſpoil into another ſhire, and had been there " taken, indicted, and arraigned upon feloniouſly ſtealing " the ſaid goods, and not upon the robbery or burglary; " for that it was not committed in the ſame ſhire where " they had been ſo indicted or arraigned; by reaſon of " which the ſaid felons, robbers, and burglars had the be- " nefit of their clergy;" enacts (ſ. 3.) " that if any perſon " or perſons be indicted of felony for ſtealing any goods or " chattels in any county within the realm of England, and " thereupon arraigned and be found guilty, or ſtand mute " of malice, or challenge peremptorily above the number " of twenty perſons, as is aforeſaid; or will not upon his ſaid " arraignment directly anſwer to the ſame felony; that then " the ſame perſon and perſons ſo arraigned and found guilty, " or who ſtand mute of malice, or challenge peremptorily " above the number of twenty perſons, or will not directly " anſwer to the law, ſhall loſe and be put from the benefit " of their clergy, in like manner and form as they ſhould " have been if they had been indicted and arraigned and " found guilty in the ſame county where the ſame robbery " or burglary was done or committed; if it ſhall appear to " the juſtices before whom any ſuch felons or robbers be " arraigned, by evidence given before them, or by examina- " tion, that the ſame felonies whereupon they be ſo ar- " raigned had been ſuch robberies or burglaries in the ſame " ſhire where ſuch robberies or burglaries were committed " or done, by reaſon whereof they ſhould have loſt the be- " nefit of their clergy by force of the ſaid ſtatute, in caſe they " had been found guilty thereof in the ſame ſhire where " ſuch robberies or burglaries were ſo committed or done."

2 Hawk. ch. 33. ſ. 81.
1 Hale, 518, 519.
2 MS. Sum. 253.
Sum. 241.

Theſe ſtatutes extended not to outlaws or perſons appealed, nor to offences committed out of England, nor to ſuch ſtealing as is excluded from clergy by ſubſequent ſtatutes: but theſe omiſſions are, except as to appeals, ſupplied

3 W. & M. c. 9. ſ. 3.

by the ſtat. 3 W. & M. c. 9. ſ. 3. whereby " If any perſon " or perſons indicted of felony for ſtealing of any goods or " chattel in any county of England, Wales, or town of " Berwick-upon-Tweed, and thereof be convicted or at- " tainted, or upon arraignment ſtand mute, or will not di- " rectly

" rectly anſwer to the indictment, or challenge peremptorily above twenty, &c. he or they ſhall be excluded from " the benefit of clergy, if it appear upon evidence or examination before the juſtices that the ſaid goods or chattel " were taken by robbery, or burglary, or in any other manner, in any other county, whereof if ſuch perſon or perſons had been convicted by a jury of the ſaid other county, he or they *are* excluded by virtue of this or any other " act from having the benefit of clergy."

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4 Blac. Com. 305.

But this ſtatute does not extend any more than the former to larcenies ouſted of clergy by ſubſequent ſtatutes; for the words are "*are* excluded." And neither of theſe ſtatutes extends to appeals or to acceſſaries. It is alſo obſerved that theſe ſtatutes, ſpeaking only of counties, do not extend to caſes where the thief is taken with the goods in a liberty or corporation. But this I apprehend muſt at leaſt be intended where ſuch liberty or corporation has juriſdiction of the felony, and the trial is had there.

2 MS. Sum. 253. 440. 544. MS. Tracy, 241. *Vi.* 1 Hale, 519, 520. & 1 Ed. 6. c. 12. 11 Co. 31.

It ſeems plainly to be underſtood, though not expreſſed in the ſtatute of King William, that the offender muſt have been poſſeſſed of the goods in the county in which the trial is had, otherwiſe he cannot be convicted of larceny in ſuch county. Hence it is, if the value of the goods ſo found there do not exceed 12 d. the offender can only have the proper judgment for petit lareeny, and no other, in reſpect of the robbery, &c. proved in another ſhire upon the evidence or examination: for being convicted of no offence which will warrant a judgment of death, and conſequently having no need to demand clergy, he cannot be hurt by being excluded from the benefit of it.

2 MS. Sum. 253. 439. 2 Hawk. ch. 33. ſ. 83. 1 Hale, 536. 2 Hale, 349. 351.

§ 158. *Appearing on evidence or examination.*

The words of the ſtatute of W. & M. " if it appear upon " evidence or examination," &c. are to be intended not only where the party is found guilty by the jury upon plea of not guilty, but alſo where he ſtands mute or challenges peremptorily above twenty, or will not directly anſwer, or is outlawed, or confeſſes. The ſame words in the ſtat. of Hen. 8. could not apply to the caſe of outlawry, that being omitted in the former part. And Lord Hale was of opinion that they did not extend to the caſe of a confeſſion

2 Hawk. ch. 33. ſ. 82. & 23. & 31. 2 Hale, 348. 1 And. 114. 2 MS. Sum. 253.

1 Hale, 518.

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upon record. Yet it ſeems that though the latter might not fall within the ſtat. of Hen. 8. it is within that of W. & M. which has the words "*convicted or attainted.*" But the reaſoning of Hawkins goes to both ſtatutes; for he ſays that a ſtatute taking away clergy from thoſe who ſhall be *found guilty* extends as well to thoſe who ſhall *confeſs* themſelves guilty upon record, as to thoſe who ſhall be found ſo by verdict; for the former are found guilty by the court on conviction from their own mouths, which is evidence of the higheſt nature poſſible.

2 MS. Sum 253. 439. 543. Dub. 2 Hawk. ch. 33. ſ. 28.

And if the indictment contained an averment that the goods were taken by robbery, &c. in another county, to which the priſoner pleaded guilty; that may be thought to get rid of the difficulty above ſuggeſted; for then the fact would clearly appear to the court by examination of the record itſelf.

1 Hale, 518. 2 Hawk. ch. 33. ſ. 82. 2 MS. Sum. 253. 440. 543.

It is agreed, however, on all hands, that there is no need to make any entry on the record that it appears by ſuch evidence or examination that the felony was originally committed in a different county, and was of ſuch a nature that the offender could not have had his clergy there; though it is uſual to make ſuch entry. It is alſo ſaid to be uſual to write in the margin of the indictment that it is for robbery, &c. in another county.

Butler's caſe, O. B. Jan. 1720. Serjt. Forſter's MS.

Butler was indicted for ſtealing goods of great value from Sir Juſtinian Iſham and others. Upon evidence it appeared that they were robbed upon the highway in Hertfordſhire, and that the goods were found upon the priſoner in Middleſex: and it appearing alſo in evidence that the priſoner was the perſon who robbed them in Hertfordſhire, he received ſentence of death, and was executed.

R. v. Evan Evans, O. B. Aug. 1706. Burnet's MS. 69. 2 MS. Sum. 544.

But in Evan Evans's caſe, who was indicted for larceny at the O. B.; it appearing that the goods were taken from the owner by robbery in Eſſex; but there being no evidence that the priſoner was preſent, unleſs the finding of the goods upon him in Middleſex, he had his clergy upon mature deliberation by Holt C. J. and two other Judges.

Yet quære in the above caſe if the evidence of finding the goods on the priſoner were of ſuch a nature as would be evidence

evidence againſt him of his having committed the robbery in the county where the fact happened? Ch. XVI. §158. *Goods taken by robbery, &c. in another ſhire.*

It is ſaid that Eyre C. J. (*a*) was of opinion, that it was diſcretionary in the Judge by theſe ſtatutes, whether he would examine into the circumſtances of the fact in the other county ſo as to ouſt the priſoner of clergy. But I know of no principle whereon to found ſuch a diſcretion in a Judge to admit or refuſe legal evidence. But what was alſo ſaid by the ſame Judge is deſerving of conſideration, that in order to ouſt clergy on the ſtatute it muſt be by counterplea to the prayer of clergy.

Serjt. Forſter's MS.
(*a*) The firſt of that name.
Vi. 2 MS. Sums 254.

With reſpect to the trial of the receivers of ſtolen goods, I have already noticed what was neceſſary to be ſtated in this reſpect in what was before ſaid touching the general deſcription of theſe offenders. *Receivers.* Ante, f. 142.

Indictment, Evidence, and Verdict.

§ 159. *Form of indictment in larceny.*

The next object of conſideration is the form of the indictment in larceny, and the general evidence applicable thereto, to warrant the finding of the jury on the charge as laid. Much of this branch of the ſubject having been already very fully conſidered, in treating of the ſeveral conſtituent parts of the offence, I ſhall do little more than advert to the former heads. 1. The indictment for ſimple larceny ought to ſtate the kind of goods ſtolen: merely charging the priſoner with having ſtolen *the goods and chattels* of another is not ſufficient: Though the unneceſſary addition of thoſe words has been holden not to vitiate an indictment otherwiſe good. But bills, bank notes, &c. may be deſcribed in a general manner, and need not be ſet out verbatim. It is the more neceſſary to ſtate the deſcription of the property in order that it may appear upon the face of the indictment that the thing taken is ſuch whereof larceny may be committed. And therefore, if primâ facie it is not the ſubject of larceny, as an animal feræ naturæ, the indictment muſt ſhew it to be dead, tame, or confined, in which ſtate it may be the ſubject of individual property. There is this further reaſon too, that the court may be enabled to ſee what judgment ought to be pronounced upon the whole of the indict- Ante, f. 27, &c. 2 Hale, 182, 3. Ante, f. 601, 2. Ante, 607. 658.

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ment. However, it has been ruled that a charge of ſtealing a piece of linen of A. N. without laying it to be his *goods and chattels*, was uncertain and bad; and therefore it is not ſafe to omit them; though that caſe may have turned more upon the ſuppoſed want of a ſufficient allegation that the linen was the property of A. N. than upon the omiſſion of thoſe particular words. Alſo the number of things ſtolen of the ſame kind ſhould be ſtated, as 20 ſheep, &c.: and whatever property is omitted to be ſtated in an appeal of larceny is in ſtrictneſs confiſcated. 2. The indictment ſhould ſtate the value of the goods, in order that it may appear whether the offence be grand or petit larceny; and the value of each of the ſeveral kinds of property ſpecified in the indictment ought properly to be added. 3. Alſo to whom the property of the goods ſtolen belongs: in which reſpect nothing remains to be added to what was before noted, except that there is no need to give any addition to the owner, though ſometimes it may be convenient for diſtinction ſake to do ſo. 4. The indictment muſt allege that the priſoner *took and carried away* the goods. Lord Hale refines on this when he ſays, that it ſhould be *cepit et aſportavit* in caſe of dead chattels, *cepit et abduxit* in the caſe of a horſe; *cepit et effugavit* in caſe of ſheep, &c. 5. The offence muſt be charged to be committed *feloniouſly* as in caſe of other felonies: ſaying only that the priſoner *ſtole* the goods, &c. is not ſufficient. Other matters are referable to the general head of indictment.

Long's caſe, Cro. Eliz 490. 2 Hawk. ch. 25. ſ. 71.

Sum. 184.

2 Hale, 183.

2 Hale, 181.

Dy. 99.

Ante, 650, &c.

2 Hale, 182.

2 Hale, 184.

1 Hale, 504, 8.

Ante, 554.

Staundf. 24. b. *Vide* Kel. 29. and Rex v. Scofield, Cald. 401. Ante, ſ. 134.

One indicted of grand larceny may be convicted and have judgment of petit larceny only; but not of treſpaſs.

§ 160. *In aggravated larcenies.*

1 Hale, 517. 525. 535. 561. 2 Hawk. ch. 33. ſ. 25. MS. Burnet, 79. (*Vide* ante, Burglary, p. 515.)

Ante, ſ. 157.

In all caſes of aggravated larceny from which clergy is excluded by ſtatute, the indictment ought to ſtate preciſely, and the evidence ought to eſtabliſh, the ſubſtantial and diſtinguiſhing facts which conſtitute the offence; with the exception before noticed as to robbery and burglary in another county: and if either the indictment or the proof be defective in any one particular the priſoner is entitled to be acquitted of the capital part of the charge; though the offence proved, if it had been properly laid, would have been ouſted of clergy by ſome other ſtatute. But the indictment

may

may be so framed as to include several capital charges, and if any one be proved the offender will be ousted of clergy. As where the charge is for breaking and entering the dwelling house in the night and stealing therein to the amount of 40s.; he may be acquitted of the burglary and found guilty of stealing to the amount of 40s. in the dwelling house; from which clergy is ousted by the stat. 12 Ann. c. 7. And in all cases of aggravated larcenies he may be convicted of the simple larceny if that be proved, although the indictment conclude against the form of the statute. Yet such a conclusion is not necessary to oust clergy where the indictment is framed upon a statute ousting clergy under circumstances from that which was before felony at common law. As to the form of entering the verdict in such cases, what was before said in another place will suffice.

Ch. XVI. § 160. *In aggravated larcenies.*

Ante, tit. Burglary, p. 515. 1 Hale, 535, 561.

Ante, 516, &c.

§ 161. *Larceny and robbery in houses, &c.*

In the particular instances of larceny and robbery in houses, &c. the several offences relating to which have been before largely discussed; in order to oust the offender of clergy some or other of these things must be stated in the indictment: 1. a breaking of the house, some person being therein; or, 2. a putting in fear of some person therein, which must be stated to be done by the prisoner; in both which cases there must be an entry likewise charged; and the value of the goods taken must be above 12d. and so laid in the indictment, otherwise the offence amounts but to petit larceny, and does not require the benefit of clergy; or, 3. a breaking and entering in the day time and stealing to the value of 5s. no person being in the house at the time; or, 4. stealing privately in a shop, &c. to the value of 5s. though no person be therein; or, 5. a stealing in a dwelling house or outhouse to the value of 40s. In all these instances the indictment ought also to set forth the general description of the goods and their value, and of the house out of which they were taken; in order that the case may appear on the face of the record to be brought within one or other of the several statutes. It is also proper upon indictments under these statutes not only to state in whom the property of the goods stolen is, as before expressed, but also the name of the owner of the house out of which they are taken. In

Ante, 623, &c.

Ante, 635.

Vide ante, 634.

Ch. XVI. § 161. *In houses, &c.*

White's case, where the prisoner was indicted for burglary and stealing goods in the dwelling house of J. S. to the amount of above 40s. it not appearing to be J. S.'s house, Gould and Buller Js. held that the prisoner could neither be convicted of the burglary nor upon the stat. 12 Ann. c. 7. The like was ruled in Woodward's case, for stealing in the dwelling house of Sarah Lunns, whose name turned out to be S. London. Trapshaw's case was reserved on a doubt whether the indictment, which was framed on the stat. 3 & 4 W. & M. c. 9. for breaking and entering the dwelling house of J. L. in the day time, his wife being therein, and stealing goods, properly laid it to be the dwelling house of J. L.; but the judges on conference thought it right. And in the case of an indictment laying the larceny to be in a *dwelling* house to the value of 40s. it has been expressly holden by all the Judges, that as the house was not such wherein burglary might be committed, the prisoner could not be convicted within the stat. 12 Ann. c. 7. The materiality, however, of such an averment is entirely out of the question upon an indictment for robbery, where it has been holden to be mere surplusage, and that it may be rejected. But that turns on the stat. 3 W. & M. c. 9. which ousts clergy in all cases of robbery generally; and therefore the place where the offence is committed is mere matter of form. But under the statutes in question the place is of the essence of the offence so far as respects clergy, and therefore ought to be accurately described in the indictment.

White's case, O. B. Feb. 1783. 2 Leach, 286.

Woodward's case, O. B. Oct. 1785. cor. Adair Serjt. R. ib. 287. *vide* Trapshaw's case, ante, 506.

R. v. Davis, alias Silk, O. B. 1800. MS. Jud. ante, 499.

Robbery. Ante, f. 138. *Vide* post. f. 168. *Vide* ante, p. 415. Ante, 741.

§ 162. *Indictments for larceny of particular goods, or by particular persons.*

In respect to indictments for larceny of particular goods, or by particular persons, from whence clergy has been ousted by different statutes, it seemed more convenient to state all the determinations upon the construction of such statutes under the respective heads into which they were distributed; to which I refer.

§ 163. *Indictment against receivers.*

The indictment against a receiver of stolen goods need not allege time and place to the fact of stealing the goods: it is sufficient if they be alleged to the fact of the receipt. This was expressly decided upon consideration in Stott's case, upon an indictment against him as a receiver of pieces

Rex v Stott, H. 39 G. 3. B. R. Ante, 753 *Allegation of time and place.*

of

of iron, which was removed into B. R. by writ of error after judgment againſt him of impriſonment by the Quarter Seſſions; though ultimately the court gave no opinion on the reſt of the caſe, the writ of error being abandoned by the priſoner. It appeared on inquiry of the clerks of aſſize of the Weſtern and Oxford circuits, and of the clerk of the arraigns at the Old Bailey, that ſuch had always been the form of indictment uſed by them.

Ch. XVI. § 164. *Againſt receivers.*

In the caſe of John Thomas the indictment was for receiving goods ſtolen by perſons unknown: which was objected to be inſufficient in not aſcertaining the principal thief, and that it ought to appear to whom in particular the priſoner was acceſſary. This objection being referred to the Judges, they were unanimouſly of opinion that the indictment was good; that the great view of the ſtatutes was to reach the receivers where the principal thieves could not eaſily be diſcovered,

Thomas's caſe, O.B. May 1766. 2 MS. Sum. 400. MS. Jud. Ante, 651. *Principal unknown.* Infra.

Where the principal however is known, it ſeems proper to ſtate it according to the truth: and the common form of the indictment is to ſtate the fact of ſtealing the goods by the principal, and the receipt of them by the receiver, he then and there well knowing the ſaid goods and chattels to have been feloniouſly ſtolen, &c. But poſſeſſion alone of the king's ſtores, with the king's marks, is ſufficient to conſtitute the offence by ſtatute, unleſs accounted for in the manner before ſtated. And it is ſufficient if the thing received be the ſame in fact as that which was ſtolen, though paſſing under a new denomination, as where the principal was charged with ſtealing a live ſheep, and the acceſſary with receiving 20lb. of mutton, *part of the goods ſtolen.*

(*Vide* Kirnan's caſe, tit. Indictment—Surpluſage.) Ante, 765.

Cowell and Green's caſe, ante, f. 48.

On an indictment upon the ſtat. 22 Geo. 3. c. 58. f. 1. againſt a receiver for a miſdemeanor, on which he was convicted, the caſe came before ten of the Judges preſent at a conference in Trinity term 1792, who were of opinion that the ſecond count, which ſtated the felony to be petit larceny only, was good; this being a miſdemeanor: and that the firſt count was alſo good, which ſtated that the principal was unknown; for that was equivalent to ſaying that he was not convicted. And the majority agreed that the

§ 164. *For miſdemeanor.* Baxter's caſe, Trin. T. 1792. MS. Buller J.

Ch. XVI § 164. *Against receivers.*

the averment that the principal was not convicted was not neceſſary in any caſe; for it would be a negative averment, which, if laid, need not be proved by the proſecutor; but was evidence for the defendant; and if proved by him, would entitle him to an acquittal for the miſdemeanor. This latter point was alſo determined by B. R., into which the record was brought by certiorari, upon a motion in arreſt of judgment. Neither is it neceſſary in ſuch an indictment to aver that the principal cannot be taken.

Rex v. Baxter, M. 33 G. 3. 5 Term Rep. 83. Rex v. Pollard and Taylor, 2 Ld. Ray. 1370. 3 MS. Sum. 44.

Vide ante, ſ. 142.

§ 165. *Averring conviction of principal.*

The receiver being, by the ſtat. 3 W. & M. c. 9. ſ. 4. made an acceſſary after the fact to the felony, the ſame method of charging the principal fact which obtains in caſe of acceſſaries in general will ſuffice againſt the receiver.

Hyman's caſe, Kingſton aſſizes 1801. cor. Heath J. MS. Jud. *Sufficient in indictment againſt receivers to ſtate conviction (without attainder) of principal, and ſubſequent receipt of goods with knowledge.* *Vide* Indictment —Acceſſaries.

In Hyman's caſe, the indictment ſtated, that at the gaol delivery of Newgate, holden on Wedneſday the 18th of February laſt, James Barnes was *convicted* on an indictment for burglary in the dwelling houſe of William Kerr, at Sunbury in the county of Middleſex, and ſtealing therein the goods and chattels there mentioned; and that after the ſaid burglary and felony was done and committed, the priſoner, on the 9th day of the ſaid February, the ſaid goods and chattels feloniouſly did receive and have, well knowing the ſame to have been ſtolen and carried away, againſt the ſtatute, &c. The priſoner was convicted; and it was moved in arreſt of judgment that the indictment was bad, becauſe it was not ſtated therein that the principal was *attainted*; and Heath J. reſerved the point for the opinion of all the Judges; who all held the indictment good, as well on the authority of a number of precedents at the O. B. and on the home circuit, where the ſame form of indictment had been uſually purſued, as alſo on the conſideration of the ſtat. 1 Ann. ſt. 2. c. 9. ſ. 1, 2.

§ 166. *Principal a witneſs.*

Patram's caſe, Bridgewater Sum. aſſ. 1787. cor. Groſe J. MS. Haſlam's caſe, O. B. 1786. 2 Leach, 467. and before all the judges.

It is now agreed that the principal, though not convicted or pardoned, may be examined as a witneſs againſt the receiver. In Patram's caſe, and in Haſlam's caſe, which were proſecutions for the miſdemeanor on the ſtat. 22 Geo. 3. c. 58. the principal felons, though not convicted, were admitted as witneſſes on the part of the crown. The ſame

was

was done in Jonathan Wild's case, on a prosecution on the stat. 4 Geo. 1. c. 11. for taking a reward to help to stolen goods.

Ch. XVI. § 166. *Principal a witness.*

Wild's case, ante, f. 155.

§ 167. *In robbery.*

The form of indictment for robbery is principally distinguishable from that for larceny in these particulars, that it states an assault upon the person, and a taking of his goods, &c. by violence or putting him in fear, though both these are usually added. It may run thus, That the defendant, on, &c. with force and arms, at, &c. in and upon J. S. &c. feloniously did make an assault, and him the said J. S. in bodily fear and danger of his life then and there feloniously did put, and certain goods of such a value of the said J. S. from his person and against his will then and there feloniously and violently did steal, take, and carry away, &c.

1 Hawk. ch. 34. s. 10. Crown Circuit Comp. 339. Co. Entr. 358. b.

The assault must be laid to be made feloniously; otherwise though the putting in fear and the taking be afterwards laid to be done feloniously, the indictment is ill.

R. v. Pelfryman and Randal, O. B. Oct. 1791. cor Hotham B. and Heath J. 2 Leach, 641.

The taking must be charged to be with violence from the person and against the will of the party: but it does not appear certain that the indictment should also charge that he was put in fear; though this is usual, and therefore safest to be done. But in the conference on Donally's case, where this subject was much considered, it was observed by Eyre B. that the more ancient precedents did not state the putting in fear, and that though others stated the putting in corporal fear, yet the putting in fear of life was of modern introduction. Other Judges considered that the gist of the offence was the taking, &c. by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force. In general, however, as was before observed, no technical description of the fact is necessary, if upon the whole it plainly appear to have been committed with violence against the will of the party.

Foft. 128. 1 Hale, 534. 3 Inst. 68. *Vide* Crompt. 246. b. 247. and West. Symb. Donaliy's case, ante, 719.

Ante, f. 127.

At the O. B. 1766, Thomas Smith was indicted for assaulting the prosecutor with force and arms, and putting him in corporal fear, and taking a sum of money from his person against his will. The prisoner's counsel objected that, according to Lord Hale, all indictments of robbery must shew that

Smith's case, 2 Ms. Sum. 261. & MS. Gould J.

1 Hale, 534.

Ch. XVI. § 167. *In robbery.*

that the taking was done *violenter*: and as that was not charged in the present indictment, the prisoner was entitled to his clergy. This point being reserved for the opinion of the Judges, they all agreed that a robbery was sufficiently described in this indictment. That the word *violenter* was no technical term essentially necessary in the indictment: if it appeared upon the whole that the fact was committed with violence it was sufficient to constitute a robbery: and here it was charged that the prisoner put the prosecutor in fear, and took the money from his person against his will. It was all one continued act, begun with putting the prosecutor in fear, and completed by taking the money from him against his will. That Lord Hale, in the passage referred to, was inaccurate in his expression; but the definition which he gave of robbery was, a felonious taking from the person with violence; and if the fact were so described in the indictment as to answer the definition, it came up to Lord Hale's own doctrine.

2 Hale, 534, 5, 6.

But here, as in all complicated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear or violence, and found guilty of the simple larceny. Yet where upon an indictment for robbery from the person, a special verdict was found stating facts which in judgment of law did not amount to a taking from the person, but shewed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, Whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment, the Judges thought that judgment as of larceny could not be given upon that finding; but they remanded the prisoners to be tried upon another indictment for that offence.

Rex v. Francis and others, before all the judges at Serjeants' Inn, Com. Rep. 478. Rep. temp. Hardw. 115.

§ 168. *Allegation of place.*

Many nice cases have been determined as to what should be considered as a robbery in or near the king's highway, and as to the manner of laying it in the indictment; which it seems was most usually done in the disjunctive, "in or near," &c. But these are now become unnecessary to be considered since the passing of the stat. 3 W. & M. c. 9. first mentioned in all cases at least falling within the statute; more especially after the several subsequent determinations which

1 Hale, 535, 6. MS. Burnet, 74.

Ante, 741.

which have been made. Several malefactors took a houſe, and ſent for a tradeſman thither under pretence of buying goods from him, and robbed him there. The indictment alleged the offence to have been committed *near the king's highway;* and it was holden to be within the ſtat. of 1 Ed. 6. c. 12. ſ. 10. But this may well be doubted, if ſuch really were the determination; for the device of charging a robbery in the dwelling houſe to be near the king's highway ſeems to confound diſtinct offences. It is more probable that it was holden to fall within the ſtat. 3 W. & M. c. 9. which is ſufficient to reach ſuch a caſe without any device of that kind. For that ſtatute is ſo generally worded that it takes in all ſorts of robbery, either in a highway, houſe, or elſewhere. And this is the more probable from a ſubſequent caſe of Summers and others, who were in the like manner indicted for a robbery near the highway, and taking 13 l. from the perſon of J. H.; on which a ſpecial verdict was found that J. H went to an alehouſe in Smithfield, and there was ſet upon and robbed. And all the Judges, at Serjeant's Inn, on the 25th May 1705, held, that though the indictment were ſpecial for a robbery near the highway, and this in a houſe was not ſo; yet as the ſtat. 3 Will. & M. took away clergy in all robberies, the priſoners ſhould not have their clergy. Again, in the caſe of Darnford and Newton, at the O. B. Gould J. Hotham B. and Buller J. determined upon the ſame principle; where the robbery was in a houſe in a ſtreet hired by one of the priſoners for the purpoſe, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling houſe of that priſoner.

Ch. XVI. § 162. *In robbery.*

2 MS. Sum. 264. Fowler's caſe, O. B. 10 W. 3.

Ante, 625.

Ante, 629.

R. v. Summers and others, O. B. 20th Feb 1705. 2 MS. Sum. 264. 547. by a note of Nares J. Ex relatione Parker C. B. from Mr. J. Price's MS.

R. v. Darnford and Newton, O. B Sept 1780. 2 MS. Sum. 264. 547.

And, lately, all the Judges held that one Wardle was ouſted of clergy upon an indictment charging him with robbing another in a field near the highway; on a finding by the jury that he was guilty of the robbery, but not near the highway.

Wardle's caſe, Derby Lent Aſſ. 1800 cor. Chambre B. MS. Buller J. & MS. Jud.

It is equally immaterial, as was juſt before obſerved, in the caſe of roboery, whether the ownerſhip of the houſe be properly deſcribed in the indictment.

John Pye was convicted upon an indictment which charged him with robbing Robert Fernyough in the dwelling

Pye's caſe, Warwick, 1790. cor Thompſon B. MS. Buller J. & MS. Jud.

Ch. XVI. § 168. *In robbery.*

ing houſe of Aaron Wilday. The fact was committed in a houſe, but it did not appear who was the owner of it. But on reference to the Judges, in Eaſter term 1790, they all held the conviction proper.

S. Johnſtone's caſe, 1793. cor. Aſhhurſt J. MS. Buller J.

Suſannah Johnſtone was convicted on an indictment for robbing Richard Dicken, in the dwelling houſe of *Joſeph* Johnſtone, at Birmingham. The robbery was committed by the wife in the huſband's houſe, whoſe chriſtian name could not be proved. But in Eaſter term 1793 all the Judges held the conviction proper.

§ 169. *Appeal.* Sum. 184. 2 Hawk. ch. 23. ſ. 44. 47. Keilw. 70. pl. 7. *Vide* ante, f. 90.

Concerning the appeal of larceny or of robbery, it lies by the party grieved againſt the felon; and a ſpecial property in the goods, though not a bare charge, is ſufficient to maintain it: in which caſe the ſpecial owner may either declare generally as for his own goods, or ſpecially as for the goods of the owner in his poſſeſſion; and if two joint owners be robbed, the ſurvivor may have an appeal; but it muſt expreſsly appear whoſe goods they were, in order to ſhew that the plaintiff is entitled to the appeal. But though a man were robbed at ſeveral times before by the ſame perſon, he ſhall have but one appeal.

2 Hawk. ch. 23. ſ. 78.

Sum. 184. Hawk. ut ſupra.

As in the caſe of an indictment ſo in appeal, if one be robbed in the county of A. and the felon go with the goods into the county of B. an appeal of robbery lies in A.; but of larceny only in B.; for the ſtat. 25 H. 8. c. 3. extends only to the caſe of indictments. So if A. be robbed by B., who is robbed of the ſame goods by C., A. may have an appeal of larceny againſt C.

Ante, p. 771, 2.

Sum. 185. 2 Hawk. ch. 23. ſ. 48. 52. Staundf. 62. Fol. f. 170.

There does not ſeem to be any preciſe limit of time for this appeal, provided there be freſh ſuit, of which the court are to judge in their diſcretion; as is elſewhere ſhewn. But it ſeems moſt proper to call in aid the aſſiſtance of the ſame jury which tries the felon, or an inqueſt of office to inquire ſpecially, concerning ſuch freſh ſuit.

VII. *Of Reſtitution of ſtolen Goods.*

Ch. XVI. §170. *On appeal.*

§ 170. *Reſtitution of ſtolen goods.* 1 Hale, 538.

There are ſeveral methods by which the party robbed, or whoſe goods are ſtolen, may have reſtitution;

1. By Appeal of Robbery or Larceny;
2. By ſtat. 21 H. 8. c. 11. on Indictment;
3. By the Courſe of the Common Law.
4. By ſtat. 31 Eliz. c. 12. in caſe of horſe-ſtealing.

By appeal. 2 MS. Sum. 609. 611, 12. 1 Hale, 538. 540, 1. Crompt. Juſt. 191. 2 Hawk. c. 23. ſ. 40, &c. Kel. 96. Bro. Abr. Judges, pl. 26.

1. The appeal muſt be brought upon freſh ſuit; but the time and manner of the purſuit is not now tied down to ſuch ſtrictneſs as formerly: for though the felon be taken by other perſons, as the ſheriff, &c. yet if the party robbed come within the year and enter his appeal, that is deemed a freſh ſuit, provided he had uſed reaſonable diligence ſoon after the felony to apprehend and proſecute the felon; of which the juſtices, in diſcretion, are to judge; though without hue and cry raiſed. 2. If the principal felon, or any one of ſeveral, be convicted or attainted on ſuch appeal; or ſuch conviction become impoſſible notwithſtanding the endeavour of the appellant; as by the death of the felon after he is taken, or a prior attainder at the ſuit of another; and the freſh ſuit be found by the verdict or by an inqueſt of office; the appellant ſhall have reſtitution of ſuch of the goods as are mentioned in the appeal, notwithſtanding a ſeizure by the lord, or a ſale in market overt: but the goods omitted are forfeited to the king; and ſo are all the goods upon a falſe appeal, where it appears that the appellee did not come to the goods by felony. But the uſe of appeals is in a great meaſure ſuperſeded by the reſtitution given,

Poſt. 789.

§ 171. By 21 H. 8. c. 11. 2 MS. Sum. 610. 2 Hawk. ch. 23. ſ. 56, &c. 1 Hale, 542.

2. By the ſtat. 21 H. 8. c. 11. which firſt gave reſtitution upon an indictment; whereby it is enacted, "That if any "felon or felons do rob or take away any money, goods, or "chattels from any of the king's ſubjects, from their per- "ſons or otherwiſe, within this realm; and thereof the ſaid "felon or felons be indicted, and after arraigned of the "ſaid felony and found guilty thereof, or otherwiſe attaint- "ed, by reaſon of evidence given by the party ſo robbed, or "owner of the ſaid money, goods, or chattels, or by any

Ch. XVI. § 171. By ſtat. 21 H. 8. c. 11

"other by their procurement; that then the party ſo "robbed or owner ſhall be reſtored to his ſaid money, "goods, and chattels; and that as well the juſtices of gaol "delivery as other juſtices before whom any ſuch felon or "felons ſhall be found guilty or otherwiſe attainted, by "reaſon of evidence given by the party ſo robbed or owner, "or by any other by their procurement, have power by this "act to award from time to time writs of reſtitution for the "ſaid money, goods, and chattels, in like manner as though "any ſuch felon or felons were attainted at the ſuit of the "party in appeal."

Vide Caſ. temp. Hardwicke, 349. 1 Hale, 543, 6. 4 Blac Com 363. Kel. 58. 2 Inſt. 714. MS. Tracy, 276

The writ of reſtitution has fallen into diſuſe; but upon production of the goods at the trial the court orders them to be reſtored to the owner, without any inquiry as to freſh ſuit; and if not reſtored, he may maintain trover for them after conviction; and this notwithſtanding a ſale in market overt, as is now fully eſtabliſhed. But reſtitution can only be had from the perſon in poſſeſſion of the goods at the time of or after the felon's attainder. Therefore if a party purchaſe them bonâ fide in market overt, and ſell them again before conviction, no action will lie againſt him for the value, though notice were given to him not to ſell.

Horwood v. Smith, 2 Term Rep. 750.

2 MS. Sum. 612, 613. Staundf. 167. 1 Hale, 42. 545. 2 Hawk ch. 23. ſ. 36. Kel 48, 9 3 Inſt. 242. 4 Blac. Com. 363.

The conſtruction of the above ſtatute with reſpect to reſtitution upon conviction is in a great meaſure governed by the rules reſpecting appeals; though in one reſpect it is more favourable to the owner: for in proſecutions under this ſtatute the practice is to award reſtitution, though there be no freſh ſuit, nor any inqueſt concerning the ſame, as is neceſſary in caſe of appeals. Yet if it appear that the owner has been guilty of groſs neglect in proſecuting, Hawkins thinks that the court, in analogy to the proceedings in appeal to which the ſtatute refers, may in their diſcretion deny reſtitution under this ſtatute. Perhaps it might be thought ſufficient in ſuch a caſe to put the party to ſue out his writ of reſtitution: for I find no inſtance where the writ itſelf has been denied on this ground; and the general opinion is that it cannot. If the teſtator be robbed, or the ſervant be robbed of his maſter's goods, the executor or maſter procuring conviction of the felon ſhall have reſtitution. Yet if divers perſons be robbed, they muſt all in ſtrictneſs convict

2 Inſt. 714.

the thief in order to entitle themſelves to reſtitution. But the practice is after the felon is convicted upon one indictment, if the goods of other perſons be found upon him, and brought into court, the court uſually orders reſtitution to all who were ready to proſecute: or this may be done on an inqueſt of office, if there be any doubt as to the property. But the owner of ſtolen goods is not ſtrictly entitled to have reſtitution of any other goods than thoſe ſpecified in the indictment; for the offender might have eſcaped by the omiſſion.

Ch. XVI. § 171. By ſtat. 2 & 3 E. 6. c. 1

Ante, 787.

If the thief ſell the goods, and be immediately taken with the money, and the goods cannot be heard of, it has been queſtioned whether the proſecutor ſhall have the money. One book ſeems to incline to the negative opinion; but that when examined ſtrictly only goes to eſtabliſh that the proſecutor is not entitled to ſeize other goods, which for ought appears may be diſtinct goods of the felon, in lieu of thoſe which were taken by him. But where it is clearly aſcertained that the money is the produce of the goods ſtolen, it has been expreſsly adjudged to be within the equity of the ſtatute giving reſtitution. As in Hanberrie's caſe, where a ſervant took gold from his maſter and changed it into ſilver: and in Harris's caſe, where one ſtole cattle, which he ſold in market overt, and was immediately after apprehended with the money. And herewith Lord Hale agrees.

2 MS. Sum. 612.

W. Jones, 148. *Vide* Sty. 347.

Hanberrie's caſe, Cro. Eliz. 64. per Fenner J. Harris's caſe, Noy, 128. 1 Hale, 544, *contra* Gollightly v. Reynolds, M. 13 G. 3 B. R. Loft. 90.

But the ſtatute is confined to the reſtitution of goods ſtolen, and extends not to ſuch as are obtained by fraud. And therefore where the owner proſecuted one to conviction who had obtained goods from him by fraud, and repoſſeſſed himſelf of the goods, which in the mean time had been pawned to another for a valuable conſideration without notice, it was holden that the pawnee might maintain trover for them againſt the original owner.

Parker v. Patrick, 5 Term Rep. 175, Rex v. Stevenaux and others, 2 Leach, 905.

§ 172.

3. By common law. The neceſſity of proſecuting and convicting or attainting the felon in order to have reſtitution, is only when the property is changed by ſome intermediate act; as by the felon's waiving them in his flight; the ſeizing of them by the King's officers under ſuſpicion of felony; or by the lord of the manor; or by a ſale in market overt.

By common law. 2 MS. Sum. 611. Kel. 48 2 Hawk. ch. 23. ſ. 49 1 Hale, 546. 4 Blac. Com. 363.

Ch. XVI. § 172. *At common law.*

overt. For otherwiſe the owner may at common law peaceably retake them wherever he may find them, without any writ of reſtitution. But if the owner take them back from the offender with intent to favour him, it is unlawful, and puniſhable by fine and impriſonment. And ſo is the practice (now prohibited by ſtatute) which prevailed much at one time of advertiſing a reward for bringing ſtolen goods, and no queſtions to be aſked; which Lord Macclesfield declared to be a kind of compounding of felony, by ſtopping inquiry and proſecution in conſequence of the owner's obtaining the goods again. But after conviction it is clearly no crime to take the goods again whereſoever they are found; for having proſecuted the law againſt the offender, the owner is entitled to reſtitution whenever he pleaſes; and may bring trover againſt any perſon in whoſe hands the goods are.

1 Hale, 546. n. *Vide* ante, 771. & ſ. 141.

§ 173. 31 Eliz. c. 12. *In horſe ſtealing.* Ante, ſ. 47.

4. Special proviſion has been made for reſtitution in the inſtance of horſe-ſtealing, by the ſtat. 31 Eliz. c. 12. which for avoiding horſe-ſtealing requires certain entries to be made, &c. in the toller's books of the ſale of horſes in markets and fairs, and provides, (ſ. 4.) "That if any horſe, "mare, gelding, colt, or filly ſhall be ſtolen, and after ſhall "be ſold in open fair or market, and the ſame ſale ſhall be "uſed in all points and circumſtances as aforeſaid, that yet "nevertheleſs the ſale of any ſuch horſe, &c. within ſix "months next after the felony done, ſhall not take away "the property of the owner from whom the ſame was "ſtolen, ſo as claim be made within ſix months by the party "from whom the ſame was ſtolen, or by his executors or "adminiſtrators, or by any other by any of their appointment, at or in the town or pariſh where the ſame horſe, "&c. ſhall be found, before the mayor or other head officer "of the ſame town or pariſh, if the ſame horſe, &c. ſhall "happen to be found in any town corporate or market "town, or elſe before any juſtice of peace of that county "near to the place where ſuch horſe, &c. ſhall be found, if "it be out of a town corporate or market town; "and ſo as proof be made within forty days then "next enſuing by two ſufficient witneſſes, to be produced

"and

" and depoſed before ſuch head officer or juſtice (who by virtue of this act ſhall have authority to miniſter an oath in that behalf,) that the property of the ſame horſe, &c. ſo claimed, was in the party by or from whom ſuch claim is made, and was ſtolen from him within ſix months next before ſuch claim of any ſuch horſe, &c. but that the party from whom the ſaid horſe, &c. was ſtolen, his executors or adminiſtrators, ſhall and may at all times after, notwithſtanding any ſuch ſale or ſales in any fair or open market thereof made, have property and power to have, take again, and enjoy the ſaid horſe, &c. upon payment or readineſs, or offer to pay, to the party that ſhall have the poſſeſſion and intereſt of the ſame horſe, mare, gelding, colt, or filly, if he will receive and accept it, ſo much money as the ſame party ſhall depoſe and ſwear before ſuch head officer or juſtice of peace, (who by virtue of this act ſhall have authority to miniſter and give an oath in that behalf,) that he paid for the ſame *bonâ fide*, without fraud or colluſion; any law, ſtatute, or other thing to the contrary notwithſtanding." Ch. XVI. § 173. *In horſe ſtealing.*

For other matters, *vide* general heads, Rewards, Pardon, Expences, &c.

CHAP. XVII.

PIRACY.

Juriſdiction. - - - - § 1.

By civil Law, Puniſhment capital. *ib.*

Triable as Marine Felony under King's Commiſſion by Stat. 28 H. 8. c. 15. *ib.*

Nature and Extent of ſuch Commiſſion. § 2.

1. *What is Piracy.* - - § 3.

i. Such Acts of Robbery and Depredation as would be Felony on Shore. *ib.*

Mariners ſeizing Captain and carrying away Ship explained by ſubſequent piratical Acts. *ib.*

But Breach of Truſt no Piracy. *ib.*

ii. Foreigners acting at open Hoſtility no Pirates. § 4.

But Subjects acting under Colour of foreign Commiſſions, Pirates by Stat. 11 & 12 W. 3. c. 7. *ib.*

iii. So if they act under Enemy's Commiſſion by Stat. 18 Geo. 2. c. 30. - - - § 5.

Under theſe Acts, an adhering to the King's Enemies by piratical Depredations at Sea, triable as Pirates. *ib.*

Cruiſing againſt the Ships of the King as well as the Subject ſhews Intent traitorous, not merely piratical. *ib.*

iv. Running away with Ship or Cargo, &c. Yielding voluntarily to Pirates; confederating with them, &c. Attempting to ſeduce Crew, &c. Laying violent Hands on Commander to hinder Defence, &c. Stirring Revolt, &c. Piracy by Stat. 11 & 12 W. 3. c. 7. ſ. 9. - - § 6.

v. Trading or correſponding with Pirates, Piracy and Death, by Stat. 8 Geo. 1. c. 24. - § 7.

vi. So forcibly entering Merchant Ship and deſtroying Goods on board. - - § 8.

Burning

Burning or deſtroying Ship. *Vide* Tit. Malicious Miſchief.

vii. Privateers ranſoming neutral Ships made Prize, without bringing into Port, Piracy by Stat. 32 Geo. 2. c. 25. ſ. 12. - - § 9.

Stat. 22 Geo. 3. c. 25. avoids Contracts for the Ranſom of Ships captured by an Enemy, and ſubjects Party to a Forfeiture of 500*l.* *ib.*

2. *As to the Place where the Fact is committed.* § 10.

Ancient Juriſdiction of B. R. over Felonies on the narrow Seas. *ib.*

Admiral's Juriſdiction not extending to Offences within Bodies of Counties. *ib.*

Rules for aſcertaining the Line of Demarcation. *ib.*

3. *Principals and Acceſſaries.* - § 11.

Procurers, Aiders, &c. on Land or Sea made Acceſſaries to Piracy by Stat. 11 & 12 W. 3. c. 7. ſ. 10. *ib.*

But by Stat. 8 Geo. 1. c. 24. declared to be Principals, and triable as ſuch. *ib.*

4. *Indictment and Evidence.* - § 12.

Fact muſt be alleged to be done on the Sea felonioufly and piratically. *ib.*

Not triable by Commiſſion under Stat. H. 8. if within County. Nor as Larceny by common Law, if taken at Sea and brought into County. *ib.*

Qu. As to Indictments for Piracy in B. R. *ib.*

5. *Trial and Judgment.* - - § 13.

Stat. 28 H. 8. c. 15. directs that Felonies, Robberies, &c. on the Sea, &c. be heard and adjudged in ſuch Shires as the King by Commiſſion ſhall appoint, in like Form, &c. as if committed on Land. *ib.* And excludes Clergy. *ib.* Confined to Offences which would be Felony on Shore. *ib.*

Admirals' Juriſdiction not thereby ouſted by Stat. 11 & 12 W. 3. c. 7. *ib.*

Trials of Principals alſo regulated by Stats. 4 Geo. 1. c. 11. 8 Geo. 1. c. 24. 18 Geo. 2. c. 30. and 32 Geo. 2. c. 25. *ib.*

Trial

Trial of Acceſſaries regulated by Stat. 11 & 12 W. 3. c. 7. ſ. 10. and 8 Geo. 1. c. 24. ſ. 3. § 14.

Clergy. - - - - - § 15.

Ouſted from Piracy by Stat. 28 H. 8. c. 15. and ſubſequent Statutes.

Stat. 39 Geo. 3. c. 37. declares that all Offences committed on the Sea are of the ſame Nature and liable to the ſame Puniſhment as if done on Shore; and ſhall be tried according to Stat. 28 H. 8. *ib.*

Regulations for holding at leaſt two Seſſions of Admiralty in the Year at the O. B. by Stat. 32 Geo. 2. c. 25. - - - - § 16.

Power to Commiſſioners and Juſtices of Peace to bind Witneſſes over to proſecute and give Evidence, &c. *ib.*

Finding the Bill. *ib.* Standing mute. *ib.*

Form of Judgment. *ib.* Forfeiture. *ib.*

Piracy.

§ 1. *Special juriſdiction.*

BY the civil law, the puniſhment of piracy was capital; of which the admiral took cogniſance: but it does

13 Co. 54. not fall within the ſcope of this work to conſider the offence otherwiſe than as it is a *marine* felony, triable under the King's ſpecial commiſſion by virtue of the

4 Inſt. 147. 2 Hale, 17. ſtat. 28 H. 8. c. 15. ſince followed by other ſtatutes, which proceeds according to the courſe of the common law; and

4 Blac. Com. 269. in which commiſſion two common law Judges are conſtantly included, by whom in effect the priſoners are tried, though the Judge of the Admiralty ſtill preſides.

I ſhall poſtpone for the preſent the conſideration of the ſtat. of H. 8. together with the ſubſequent ſtatutes relating

Poſt. f. 13. to the trial of this offence, till I come regularly to ſpeak of that branch of the ſubject; remarking by the way what

2 Hale, 18. Lord Hale obſerves, that beſides the commiſſion founded on the firſt-mentioned ſtatute, there had then been for a century paſt in the ſame commiſſions common law commiſſions of oyer and terminer, gaol delivery, and of the peace, for all offences againſt any penal laws, ſuper mare vel infra fluxum maris ad plenitudinem maris; and alſo of all treaſons, murders, &c.

ſuper

ſuper mare vel in aliquo rivo, portu, aquâ dulci, crecâ, ſeu infra fluxum maris ad plenitudinem maris, a quibuſcunque primis pontibus verſus mare, et ſuper littus maris, &c. ſecundum ſtylum et conſuetudinem regni Angliæ et Curiæ Admiralitatis: and limiting the county of their ſeſſion and inquiry.

Ch. XVII. § 1. *Special juriſdiction.*

§ 2. *Form of commiſſion.*

The commiſſion under which ſuch ſeſſions of admiralty are holden has exiſted in nearly the ſame form for a conſiderable period, with the inſertion only from time to time of a general reference to ſuch ſtatutes as have been made for the regulation of this tribunal. It begins by reciting the ſtatutes of the 28 H. 8. c. 15. and 27 H. 8. c. 4.; and then appoints certain perſons, amongſt others before mentioned, to be of the quorum, to inquire concerning all treaſons, piracies, felonies, robberies, murders, and conſpiracies done or committed upon the ſea, or in any river, haven, creek, or place, where the admiral has, or pretends to have any power, authority, or juriſdiction; and alſo concerning other miſdemeanors, offences, and injuries whatſoever committed againſt the form of the ſaid recited ſtatutes of H. 8. or againſt the form of the 11 & 12 W. 3. c. 7. 4 G. 1. c. 11. 1 Ann, ſt. 2. c. 9. 12 Ann, ſt. 2. c. 18. 11 G. 1. c. 29. 8 G. 1. c. 24. 1 G. 2. ſt. 2. c. 25. 5 Eliz. c. 5. ſ. 30. 13 G. 2. c. 4. 17 G. 2. c. 24. 18 G. 2. c. 30. or 29 G. 2. c. 34. (*a*) and to hear and determine all the ſaid treaſons and other the premiſes, and to make gaol delivery, according to the laws and cuſtoms of Great Britain, and the ſtatutes aforeſaid; and alſo to inquire of all other crimes and offences whatſoever, and acceſſaries thereto whomſoever or howſoever, had, done or committed upon the high ſea, or in any haven, river, creek, or place where the admiral has or pretends to have power, authority, or juriſdiction; and to hear and determine all ſuch crimes and offences, according to the laws and cuſtoms of Great Britain, and the ſtatutes aforeſaid, or other ſtatutes in that behalf made; as by the laws and ſtatutes of the kingdom, may or ought to be heard, or determined by any commiſſioners or juſtices appointed by the crown. It then commands the quorum commiſſioners, or one of them, to make inquiry concerning the premiſes, and to hear and determine

(*a*) And *vide* ſt. 32 G. 2. c. 25. and 39 G. 3. c. 37.

the

Ch. XVII. § 2. *Commiſſion under* ſt. 28 H. 8. c. 15.

the ſame, and to do and perform all things to be done thereupon, as appertains to juſtice, according to the laws and cuſtoms of the kingdom, and the ſtatutes aforeſaid, or other ſtatutes in that behalf made: and then concludes with the command to all ſheriffs, &c. in the uſual form of the commiſſion of oyer and terminer.

I ſhall now conſider,

1. *What is Piracy.*
2. *Of the Place where the Fact is committed.*
3. *Of Principals and Acceſſaries.*
4. *Of the Indictment and Evidence.*
5. *Of the Trial and Judgment.*

§ 3. *What is piracy.* Co. Lit. 391 4 Blac. Com. 72. 2 MS. Sum. 285. 3 Inſt. 112. 1 Hawk. ch. 37. ſ. 6. 8. 10. 1 Hale, 354. 2 Hale, 18. 1 Rol. R. 175. Moor, 756. Poſt. 3 Inſt. 112. Rex v. Morphes, Salk. 85. *Sed vide* Co. Lit. 391. 1 Hale, 155. 2 Hale, 12, &c. Poſt. 226. Rex v. May, Biſhop, and others, Nov. 1696. MS. Tracy, 77.

The offence of piracy by common law conſiſts in committing thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would have amounted to felony there. But it is no felony at common law, being out of its juriſdiction; and before the ſtatute 28 H. 8. c. 15, it was only puniſhable by the civil law. That ſtatute, however, does not alter the nature of the offence in this reſpect; and therefore a pardon of all felonies generally does not extend to it: nor does the offence extend to corruption of blood; at leaſt where the conviction is before the admiralty juriſdiction; though the contrary is holden by conſiderable authority upon attainder before commiſſioners under the ſtat. of H. 8.

Several mariners on board a ſhip called King Charles the Second, lying near the Groyne, ſeized the captain, he not agreeing with them, and after putting him on ſhore, carried away the ſhip, and afterwards committed ſeveral piracies. This force upon the captain, and carrying the ſhip away, (which was explained by their uſe of it afterwards), was adjudged piracy; and they were executed.

Maſon's caſe, O. B. 9 G. 1. on a ſpecial commiſſion. 8 Mod. 74.

But where the maſter of a veſſel loaded goods on board at Rotterdam, conſigned to Malaga, which he cauſed to be inſured, and after he had run the goods on ſhore in England, the ſhip was burned, when he proteſted both the ſhip and cargo as burned with intent to defraud the owners and inſurers; the judges of the common law, who aſſiſted the judge of the admiralty, directed an acquittal upon an indict-

ment

ment for piracy and ſtealing the goods; becauſe being only a breach of truſt and no felony, it could not be piracy to convert the goods in a fraudulent manner until the ſpecial truſt was determined.

Ch. XVII. § 3. *What is piracy.*

§ 4.

When ſtates are in open hoſtilities, the plundering of an enemy is not piracy, but lawful capture. And before the ſtat. 11 & 12 Wm 3. c. 7. which was levelled againſt commiſſions granted by James 2. after his abdication, none were deemed pirates who acted under the commiſſion of any foreign power. But that ſtatute enacts that "if any of his "Majeſty's natural born ſubjects or denizens of this king-"dom, ſhall commit any piracy or robbery, or an act of "hoſtility againſt others his Majeſty's ſubjects, upon the "ſea, under colour of any commiſſion from any foreign "prince or ſtate, or pretence of authority from any perſon "whatſoever; every ſuch offender ſhall be deemed, ad-"judged, and taken to be a pirate, felon, and robber, and "being duly convicted thereof, according to this act, or "that of Hen. 8. ſhall ſuffer death, and loſs of lands, goods, "and chattels, as pirates, &c. upon the ſeas ought to "ſuffer."

2 MS. Sum. 285. 289.
3 Ruſtr. 28.
4 Inſt. 154.
1 Hawk. ch. 37. ſ 10
R v. Golding and others, 8 St. Tr 73
Vaughan's caſe, Salk. 635.
5 St. Tr. 24.
11 & 12 W. 3. c. 7. ſ. 8. Made perpetual by 6 G. 1 c. 19. *Acting under commiſſion of a foreign ſtate.* Poſt.

§ 5.

In addition to which, the ſtatute 18 Geo. 2. c. 30. enacts, "That all natural born ſubjects or denizens, who du-"ring any war ſhall commit any hoſtilities upon the ſea; "or in any haven, river, creek, or place, where the admiral, "&c. has power, authority, or juriſdiction, againſt his Ma-"jeſty's ſubjects, by virtue or under colour of any commiſ-"ſion from any his Majeſty's enemies, or ſhall be any "otherwiſe adherent, or giving aid or comfort to his Ma-"jeſty's enemies upon the ſea, or any haven or places where "the admiral has juriſdiction as aforeſaid, may be tried as "pirates, felons, and robbers, in the ſaid court of admiralty, "on ſhip-board or on the land, in the ſame manner as per-"ſons guilty of piracy, felony, and robbery, are by the "ſaid acts directed to be tried; and ſuch perſons being "upon ſuch trial convicted thereof, ſhall ſuffer death, loſs "of lands, &c. as any other pirates, felons, and robbers "ought by virtue of the ſtatute of the 11 W. 3. or any "other act, to ſuffer." With a proviſo (ſ. 2.), "That any "perſon

18 G. 2. c. 30. *Piracy committed under army's commiſſion.*

Proviſo, againſt ſubſequent trial for high treaſon.

Ch. XVII. §5. *What is such.*

" perſon who ſhall be tried and acquitted, or convicted, ac-
" cording to this act, for any of the ſaid crimes, ſhall not
" be liable to be indicted, proſecuted, or tried again for the
" ſame crime or fact, as high treaſon." But this act ſhall not (by ſ. 3.) prevent any offender, who ſhall not be tried according thereto, from being tried for high treaſon, within this realm, according to the ſtat. 28 H. 8. c. 15.

Poſt. ſ. 13.

Joſeph Evans's caſe, MS. Gould J. *Adhering to the King's enemies in hoſtilely cruiſing in their ſhips triable as piracy.*

On the firſt day of Michaelmas term 1782, at a meeting of all the Judges at Serjeant's Inn, Lord C. B. Skynner ſtated to them an indictment, on which a man was convicted before him at the late ſeſſion of Admiralty, founded on the ſtat. 18 Geo. 2., whereby treaſons on the high ſeas in time of war, by adhering to the King's enemies, are to be tried in like manner as piracies, &c. The indictment, after ſetting forth that there was a war between England and France, charged that the priſoner did adhere to the King's enemies; and in proſecution of ſuch adherence did, in a certain armed veſſel called the Eſcamatour, with certain perſons unknown, hoſtilely go a cruizing, with intent in maritime places to ſeize and take the ſhips, goods, &c. of our ſovereign lord the King and his ſubjects. A difficulty firſt occurred, whether the overt act were ſufficiently charged; for it was ſaid that it ſtood in an equivocal light, whether the intent might not be to commit acts of piracy: but Lord Loughborough obſerving that it was laid to take ſhips of the King, as well as of the ſubjects, it made it clear that it was an adherence to the enemy; in which opinion all concurred. In this reſpect it was compared to laying as an overt act of compaſſing the King's death, that the priſoners conſpired or agreed to ſeize the King's guards. But the principal doubt was as to the legality of the trial: as to which the caſe ſtands thus: the ſtatute of the 28 H. 8. c. 15. expreſsly includes treaſons. The 11 & 12 W. 3. c. 7. had in view, principally at leaſt, the trial of pirates, robbers, and felons on the ſea, &c. near his Majeſty's colonies, or in remote places; omitting *treaſon* as a general term; and provides that they may be tried by commiſſions of admiralty directed by that act. The 8th ſection directs, that *ſubjects committing hoſtilities againſt other ſubjects, under colour of a commiſſion from any foreign prince*, &c. ſhall be deemed pirates, felons, and robbers, and may be tried according to that act, or the ſtatute of

Allegation of a cruiſing againſt the King's ſhips, as well as thoſe of the ſubjects, ſhews the intent to be traitorous, and not merely piratical.

Ch. XVII. §5. *What is ſuch.*

of H. 8.: but this is reſtrained, except as to that particular ſpecies of adherence, to piracies, robberies, and felonies, in their ordinary acceptation. By ſ. 14. the commiſſioners under the ſtatute of H. 8. or that act, may iſſue warrants to apprehend pirates, felons, or robbers, or their acceſſaries, being within any of the colonies, &c. in order to be brought to trial in any plantation in America, *according to that act* of Will., or to be ſent to England to be tried there. Then the ſtat. 18 Geo. 2. reciting the doubt whether ſubjects entering into the ſervice of the King's enemies, on board privateers and other ſhips having commiſſions from France and Spain, and having by ſuch adherence been guilty of high treaſon, can be deemed guilty of felony within the meaning of the act of King William, and be triable by the court of Admiralty appointed by virtue of the ſaid act; in the enacting part, after particularizing that ſpecific adherence, adds, *or ſhall be any otherwiſe adherent*, may be tried *as pirates, felons, and robbers*, by the ſaid court of Admiralty, &c. concluding with the proviſos before-mentioned.

(Not ſaying "ſhall be deemed pirates," as in ſt. 11 & 12 W. 3. c. 7. ſ. 8.)

At a ſubſequent meeting of the Judges, at which were preſent Lord Loughborough, Lord C. B. Skynner, Gould J., Willes J., Aſhhurſt J., Eyre B., Perryn B., and Heath J., it was agreed that the priſoner had been well tried under the uſual commiſſion under the ſtat. 28 H. 8. For that taking the two ſtatutes of 11 & 12 W. 3. and 18 Geo. 2. together, and the doubt raiſed in the latter, whether the two inſtances of high treaſon mentioned in the ſtatute of William, and in the preamble of the act of George, could be tried as piracy, and according to that ſtatute, as being high treaſon [and yet the act of King William had particularly declared that they might, and that the offenders therein ſpecified ſhould be deemed pirates;] and then enacting, that in thoſe two inſtances, and alſo that in caſe of any other adhering to the King's enemies, the parties might be tried as pirates by the court of Admiralty, according to that ſtatute; it was ſubſtantially declaring that they ſhould be deemed pirates; and that it was a juſt conſtruction in their favour to allow them to be tried *as ſuch* by a jury.

Wedneſday, Nov. 11, 1782.

§ 6. 11 & 12 W. 3. c. 7. ſ. 9.

By ſect. 9. of the above ſtatute of W. 3. it is further enacted, that "if any commander or maſter of any ſhip, or

Ch. XVII. § 6. *What is such*

Made perpetual by stat. 6 G. 1. c. 19.

Seamen, &c running away with ship or cargo, &c. Vide Mason's case, 8 Mod. 74.

Yielding voluntarily to pirates.

Confederating with them.

Attempting to corrupt crew, &c.

Putting force on commander.

Stirring revolt.

Post.

"any seaman or mariner, shall, in any place where the "admiral hath jurisdiction, betray his trust, and turn pi- "rate, enemy, or rebel; and piratically and feloniously run "away with his or their ship or ships, or any barge, boat, "ordnance, ammunition, goods, or merchandise; or "yield them up voluntarily to any pirate; or shall bring any "seducing message from any pirate, enemy, or rebel; or "consult, combine, or confederate with, or attempt or en- "deavour to corrupt any commander, master, officer, or "mariner, to yield up or run away with any ship, goods, "or merchandises, or turn pirates, or go over to pirates; or "if any person shall lay violent hands on his commander, "whereby to hinder him from fighting in defence of his "ship and goods committed to his trust (*a*); or shall con- "fine his master; or make or endeavour to make a revolt "in the ship; he shall be adjudged deemed and taken to "be a pirate, felon, and robber; and being convicted there- "of according to the directions of this act, shall suffer "death and loss of lands, goods, and chattels as pirates, "felons, and robbers upon the seas ought to suffer."

A reward is given to the discoverer of any combination for running away with the ship, &c.

(*a*) This last provision follows verbatim a similar one in the stat. 22 & 23 Car. 2. c. 11. s. 9. which enacts generally that such an offender shall suffer death as a felon; without specifying how he shall be tried. And by the same act, s. 2. where goods shall be laden on board any English ship of 200 tons and upwards, and mounted with 16 guns or more, if the master shall yield up such goods to any Turkish ships or vessels, or to any pirates, or sea rovers whatsoever, without fighting; on proof thereof in the High Court of Admiralty, he shall be incapable of taking charge of any English ship as master or commander; and if he do, he shall be imprisoned by warrant from the said court for six months for every such offence. And in case the persons so taking the said goods shall release, &c. the ship, shall pay to the master any money or goods in lieu thereof for freight or other reward or gift; the said goods or money so given, or the value thereof, as also the master's part of the ship, &c. so released, &c. out of which the said goods were taken, shall be liable to repair the owners of the goods so delivered or taken by action in the said court; and the damages to be recovered in the manner there stated. By s. 4. if the ship be of less burthen or force, and the master shall yield it to such persons not having at least his double number of guns, without fighting, he shall be liable to all the penalties in the act. By s. 7. mariners declining or refusing to fight and defend the ship when so commanded by the master, or uttering any words to discourage other mariners from doing so, and found guilty thereof, shall lose all their wages due, and all goods which they have on board the ship, and suffer imprisonment not exceeding six months, and be kept to hard labour during such imprisonment. Also by that and stat. 8 G. 1. c. 24. certain benefits are held out to the master and mariners to resist pirates.

By

Ch. XVII. § 7. *What is such.*

§ 7. 8 G. 1. c. 24. made perpetual by 2 G. 2. c. 28. s. 7. *Trading or corresponding, &c. with pirates.*

By stat. 8 Geo. 1. c. 24. s. 1. "If any commander or master "of any ship or vessel, or any other person, shall anywise "trade with any pirate, by truck, barter, exchange, or in "any other manner, or shall furnish any pirate, felon, or "robber upon the seas with any ammunition, provision, or "stores of any kind; or shall fit out any ship or vessel "knowingly and with a design to trade with or supply or "correspond with any pirate, felon, or robber on the seas; "or if any person shall anywise consult, combine, confe-"derate, or correspond with any pirate, felon, or robber on "the seas, knowing him to be guilty of any such piracy, "felony, or robbery; every such offender shall be deemed "and adjudged guilty of piracy, felony, and robbery: and "being convicted shall suffer death (by s. 4. without bene-"fit of clergy) and loss of lands, goods, and chattels, as pi-"rates upon the seas." And the offenders shall be tried according to the stat. 28 H. 8. and 11 & 12 W. 3. By s. 2. every vessel so fitted out to trade, &c. with pirates, and the goods, shall be forfeited, half to the crown and half to the informer.

§ 8. *Forcibly entering merchants ships, and destroying goods.* 8 G. 1. c. 24. s. 1.

And by the same act, 8 Geo. 1. (s. 1.) "In case any "person or persons belonging to any ship or vessel whatso-"ever, upon meeting any merchant ship or vessel on the "high seas, or in any port, haven, or creek whatsoever, shall "forcibly board or enter into such ship or vessel, and though "they do not seize or carry off such ship or vessel, shall "throw overboard, or destroy any part of the goods or "merchandises belonging to such ship or vessel; the person "or persons guilty thereof shall in all respects be deemed "and punished as pirates as aforesaid."

The burning or destroying of ships, against which provision is made by the stat. 1 Ann. st. 2. c. 9. and other acts, will be considered hereafter. *Vide tit.* Malicious Mischief.

§ 9. 32 G. 2. c. 25. *Illegal ransoming of neutral vessels made prize.*

And by stat. 32 Geo. 2. c. 25. s. 12. (*a*) "In case any com-"mander or commanders of any private ship or vessel of war, "duly commissioned by virtue of the stat. 29 Geo. 2. c. 34. "or this act, shall agree with the commander or other per-"son of or belonging to any neutral or other ship or vessel

(*a*) This act was only to continue in force during the then war with France. The same clauses were re-enacted by st. 2 G. 3. c. 16. to continue during the then war with Spain. But *Qu.* Whether still continuing, though retained in the subsequent edition of the Statutes?

Ch. XVII. § 9. *What is ſuch.*

" (except thoſe of his majeſty's declared enemies), for the " ranſom of any ſuch neutral or other ſhip or veſſel, or the " cargo or any part thereof, after the ſame has been taken " as a prize; and ſhall, in purſuance of any ſuch agreement " or agreements, actually quit, ſet at liberty, or diſcharge " any ſuch prize, inſtead of bringing the ſame into ſome " port of his majeſty's dominions; that then every ſuch com- " mander of any ſuch private ſhip or veſſel of war, who ſhall " ſo agree for ſuch ranſom, (except as aforeſaid,) and ſhall " quit, ſet at liberty, or diſcharge any ſuch prize in manner " aforeſaid, ſhall be deemed and adjudged guilty of piracy, " felony, and robbery; and being duly convicted thereof in " manner before mentioned, ſhall ſuffer death, loſs of lands, " &c. as pirates, felons, and robbers upon the ſeas ought to " ſuffer according to the laws now in being." Provided (ſ. 13.) " That it ſhall be lawful for the commander of any private " ſhip of war upon the capture of any neutral veſſel, which " by any law or treaty ſhall be liable only to the forfeiture " of ſuch contraband goods as ſhall be on board thereof, to " receive ſuch goods from ſuch veſſel, in caſe the com- " mander thereof is willing to deliver them; and the com- " mander of ſuch private ſhip of war may thereupon quit, " ſet at liberty, or diſcharge ſuch neutral veſſel" (*a*), &c. " and if any perſon ſhall purloin or embezzle any ſuch " contraband goods before condemnation thereof, he ſhall " be ſubject to ſuch pains and forfeitures as are inflicted by " law upon perſons purloining or embezzling goods out of " any captured ſhip."

Vi. ſt. 17 (& 29) G. 2. c. 34. ſ. 11. giving the treble value of the goods ſo embezzled by any officer, ſeaman, &c.

2. *As to the Place where the Fact is committed.*

§ 10. *As to the place.* 2 Hale, 13, &c. *Vide* poſt. ſ. 12.

Lord Hale ſays, that before the latter end of the reign of Edw. 3. the court of K. B. not only had, but exerciſed, a concurrent juriſdiction with the Admiralty over felonies committed upon the narrow ſeas, and on the coaſt, though on

(*a*) By the ſtat. 22 G. 3. c. 25. and 33 G. 3. c. 66. ſ 37, &c. " it ſhall " not be lawful for any ſubject to ranſom or to enter into any contract or agree- " ment for ranſoming any ſhip or veſſel belonging to any ſubject of his majeſty, or " any merchandize or goods on board the ſame, which ſhall be captured by the " ſubjects of any ſtate at war with his majeſty, or by any perſons committing " hoſtilities againſt his majeſty's ſubjects" Sect. 2. of the firſt act and ſ. 38. of the laſt avoid all ſuch contracts and ſecurities given for the ſame; and ſ. 3. of the one and 39 of the other inflict a penalty of 500*l.* on any perſon entering into ſuch contract, to be recovered by action of debt by the informer. This latter act expired with the late war with France.

the

the high sea, being considered within the realm of England, though out of the bodies of counties: and the fact was presented and tried by men of the adjacent counties. But it is agreed on all hands that the admiral never had jurisdiction in any river, creek, or port within the body of a county: and that the stat. of the 28 H. 8. c. 15. extends not to offences done in such places; because they are and always were cognizable by the common law. And the words of that statute, "where the admiral *pretends* to have power," &c. are not to be extended to such a pretence as is without any right at all: and the first statute which gave the admiral concurrent jurisdiction in any river or creek within the land was the 15 Ric. 2. c. 3. concerning the death or mayhem of a man; which has been considered in another place.

Ch. XVII. § 10. *Admiral.*

1 Hawk. ch. 37. s. 11. 2 Hale, 15, 16. 4 Inst. 137.

Ante, tit. Homicide, s. 132. p. 368.

But it seems that the only question of jurisdiction generally considered at this day upon the statute 28 H. 8. c. 15. is, Whether the fact happened at any place within the body of a county? in which case the trial must be had before the ordinary jurisdiction; for then it does not fall within the mischief or purview of the act. And the stat. 11 & 12 W. 3. c. 7. and 32 Geo. 2. c. 25. seem to be legislative interpretations of the first mentioned statute, being passed in pari materiâ and with reference to it: and these last are confined to *any place where the admiral has jurisdiction*; which as I have before shewn cannot be within the body of a county, unless by positive statute.

Vide 1 Hawk. ch. 37. s. 11.

3 Inst. 113.

4 Inst. 137.

The only difficulty which ever occurs is with respect to what shall be considered as the line of demareation between the county and the high sea. Upon the open sea-shore it is past dispute that the common law and the admiralty have alternate jurisdiction between high and low water mark. But in harbours or below the bridges in great rivers near the sea, which are partly inclosed by the land, the question is often more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain that the admiral can have no jurisdiction in any rivers or arms or creeks of the sea within the bodies of counties, though within the flux and reflux of the tide: except in the particular instances before shewn, of mayhem and homicide done in great rivers beneath the bridges near the sea; which depend on the stat. 15 Ric. 2.

2 Hale, 17. 3 Inst. 113. 2 Hawk. ch. 9. s. 14. 1 Bac. Abr. 751. *Vide* Rex v. Sogard, Andr. 232.

3 Inst. 113. 1 Hawk. ch. 37. s. 11.

Ch. XVII. § 10. *As to place.*

2 Hale, 16. 54. 4 Inſt. 141. 13 Co. 52. Hargrave's Tracts, p. 10.

2 Hawk. ch. 9. ſ. 14. 13 Co. 52. 2 Roll. Abr. 169. 8 Ed. 2. coron. 399. 4 Inſt. 140. 12 Co. 81.

c. 3. In general, it is ſaid that ſuch parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, *where perſons can ſee from one ſide to the other.* Ld. Hale, in his treatiſe De Jure Maris, ſays, "That arm or branch of the ſea which lies within the *fauces terræ*, where a man may *reaſonably* diſcern between ſhore and ſhore, is, or at leaſt may be, within the body of a county." Hawkins, however, conſiders the line more accurately confined by other authorities to ſuch parts of the ſea where a man ſtanding on the ſide of the land *may ſee what is done on the other*, and the reaſon aſſigned by Lord Coke in the Admiralty caſe in ſupport of the county coroner's juriſdiction, where a man is killed in ſuch places, *becauſe that the county may well know it*, ſeems rather to ſupport the more limited conſtruction. But, at leaſt where there is any doubt, the juriſdiction of the common law ought to have the preference.

3. *Of Principals and Acceſſaries.*

§ 11. *Principals and acceſſaries.* 1 Hawk. ch. 37. ſ. 7. Sum. 77. 3 Inſt. 112.

2 Hale, 17. *Vide* MS. Sum. 449. 11 & 12 W. 3. c. 7. ſ. 10.

As piracy was no felony by the common law, nor made ſo generally by any ſtatute, whereby all thoſe would incidentally have been made acceſſaries in the like caſes in which they would have been ſuch at common law; and as they were neither included by expreſs words nor by conſtruction in the ſtat. 28 H. 8. c. 15. they remained as they were before triable by the civil law only if their offence were committed on the ſea; but if on the land, by no law till the ſtat. 11 & 12 W. 3. c. 7. By ſect. 10. of which it is enacted, "That every perſon whatſoever who ſhall either on "the land or on the ſeas, knowingly or wittingly, ſet forth any "pirate; or aid and aſſiſt, or maintain, procure, command, "counſel, or adviſe any perſon or perſons to do or commit "any piracies or robberies upon the ſeas; and ſuch perſon "or perſons ſhall thereupon do or commit any ſuch piracy "or robbery; then every ſuch perſon ſhall be and are here-"by declared and ſhall be deemed and adjudged to be ac-"ceſſary to ſuch piracy and robbery done and committed. "And further, that after any piracy or robbery is or ſhall "be committed by any pirate or robber whatſoever, every "perſon and perſons who, knowing that ſuch pirate or "robber has done or committed ſuch piracy and robbery, "ſhall on land or upon ſea receive, entertain, or conceal "any ſuch pirate or robber; or receive or take into his "cuſtody

" cuſtody any ſhip, veſſel, goods, or chattels which have Ch. XVII. § 11.
" been by any ſuch pirate or robber piratically and feloni- *Principals and acceſſaries.*
" ouſly taken; ſhall be and are hereby likewiſe declared,
" deemed, and adjudged to be acceſſaries to ſuch piracy and
" robbery." And then it directs, that " all ſuch acceſſaries
" ſhall be inquired of, tried, &c. and adjudged after the courſe
" of the common law, according to the ſtat. 28 H. 8. as the
" principals of ſuch piracies and robberies may and ought to
" be, and no otherwiſe: and being thereupon attainted ſhall
" ſuffer death and loſs of lands, goods, and chattels, in like
" manner as ſuch principals, according to the ſtat. 28 H. 8.
" which is thereby declared to continue in full force."

But all perſons made acceſſaries by this ſtatute are by the ſtat. 8 Geo. 1. c. 24. declared to be principal pirates, felons, and robbers, and are to be tried as ſuch accordingly. 8 G. 1. c. 24. *Vide* poſt. ſ. 14.

4. *Of the Indictment and Evidence.*

§ 12. *Indictment and evidence.*

The indictment for this offence muſt allege the fact upon the ſea to have been committed within the juriſdiction of the Admiralty, and lay it to be done felonioufly and piratically. And if it turn out that the goods were taken any where within the body of a county, the commiſſioners under the ſtatute of Hen. 8. can have no juriſdiction to inquire of it. As, on the other hand, if the goods were taken at ſea, and afterwards brought on ſhore, the offender cannot be indicted as for a larceny in that county into which they were carried: becauſe the original felony was no taking whereof the common law takes cognizance. Lord Hale indeed thinks that an indictment of piracy before ſuch commiſſioners may be formed as an indictment of robbery at common law, namely, vi et armis et felonice, &c.; for that piracy upon the ſtatute is robbery; and that offenders have been indicted, convicted, and executed for it in the King's Bench as for a robbery. But however this might have been formerly, there appears to be no inſtance of any ſuch proceeding for ſeveral centuries: and the boundary line between the two juriſdictions ſeems now ſufficiently ſettled in the manner before deſcribed.

1 Hawk. ch. 37. ſ. 6. 10.

3 Inſt. 113.

1 Hale, 355.
2 Hale, 12, &c.

Ante, 802.

Ch. XVII. § 13. *Trial and judgment.*

5. *Of the Trial and Judgment.*

§ 13. Stat. 28 H. 8. c. 15. *Vide* 35 H. 8. c. 2. For the trial of foreign treasons, ante, p. 103.

By the stat. 28 H. 8. c. 15. it is enacted, "That all treasons, felonies, robberies, murders, and confederacies committed in or upon the sea, or in any other haven, river, creek, or place, where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm as shall be limited by the king's commission or commissions to be directed for the same in like form and condition as if any such offences had been committed or done in or upon the land. And such commissions shall be had under the great seal, directed to the admiral or his lieutenant, deputy and deputies, and to three or four such other substantial persons as shall be named or appointed by the Lord Chancellor of England, to hear and determine such offences after the common course of the law of this realm used for treasons, felonies, murders, robberies, &c. done and committed upon the land within this realm."

Ante, p. 794.

How the court is constituted I have before shewn. And by section 2. "such persons to whom such commission shall be directed, or four of them at least, shall have full power and authority to inquire of such offences by the oaths of 12 good and lawful inhabitants in the shire limited in their commission in such like manner and form as if such offences had been committed upon the land within the same shire. And that every indictment found and presented before such commissioners for any treasons, felonies, robberies, murders, manslaughters, or such other offences, being committed upon the seas or in any other haven, river, or creek, shall be good and effectual in law. And if any person happen to be indicted for any such offence done upon the seas or in any other place above limited, that then such order, process, judgment, and execution shall be had, &c. as against traitors, felons, &c. for treason, felony, &c. done upon the land, as by law is accustomed. And that the trial of such offences, if denied by the offenders, shall be had by 12 lawful men inhabiting in the shire within such commission which shall be directed as aforesaid. And no challenge to be

"had

" had for the hundred. And such as shall be convict of " any such offence by verdict, confession, or process by au- " thority of any such commission, shall have and suffer such " pains of death, loss of lands, goods, and chattels as if " they had been attainted and convicted of such offence " done upon the land, and (by s. 3.) shall be excluded from " the benefit of clergy."

Ch. XVII. §13. *Trial and judgment.*

At a session of Admiralty under a commission by virtue of the stat. 28 H. 8. c. 15. Snape and Aires had two indictments found against them; one was general, for maliciously burning a ship called the Cloudesly Galley; which was done to defraud the insurers: and this the civilians said was a capital offence by their law: the other indictment was founded upon the stat. 22 & 23 Car. 2. c. 11. which makes such offence felony; but does not direct how it shall be tried. But Tracy and Powell Js., who were present, doubted if either of the indictments could be tried by the commissioners: and upon a subsequent conference of the Judges, met to consider this matter, Holt C. J. Ward C. B. and others were of opinion, as to the first indictment, that the stat. 28 H. 8. c. 15. extends only to such offences as would be felony if committed upon land. Powell J. was of a different opinion, to which Tracy J. inclined. Upon the other indictment Holt C. J. and Tracy J. thought that this was triable under the commission, and that the stat. 28 H. 8. extended to the trial of an offence made felony by a subsequent statute: but the other Judges being of a different opinion, it was agreed that it was not proper to try the prisoners upon either of the indictments. The particular doubt, however, in that case is cleared up by the stat. 1 Ann. st. 2. c. 9. s. 4.; and to obviate the like doubt particular provision has been made in other statutes relative to the trial of other offences committed at sea.

Rex v. Snape and Aires, Sess. after Trin. T. 1702. MS. Tracy, 78.

But doubts having arisen, Whether the stat. of Hen. 8. had not taken away the jurisdiction of the admiral in the trial of these offences? the stat. 11 & 12 W. 3. c. 7. s. 1. provides " that all piracies, felonies, and robberies commit- " ted in or upon the sea, or in any haven, river, creek, or " place where the admiral has jurisdiction, &c. may be exa- " mined, inquired of, tried, heard, and determined in any " place at sea or upon the land in any of his majesty's " islands, plantations, colonies, dominions, forts, or facto- " ries,

Vide 2 Hale, 368.

11 & 12 W. 3. c. 7. s. 1. made perpetual by 6 G. 1. c. 19. This stat. directs in what manner courts of admiralty abroad authorised to try pirates shall be assembled and proceed.

Ch. XVII. § 13. *Trial and judgment.*

and *vide* Beawes Lex Merc. fo. 243. and Molloy, b. 1. c. 4. f. 12, 13 where captors of pirates may execute justice on them.

" ries, to be appointed for that purpose by the king's commission under the great seal, or the seal of the Admiralty, " directed to any of the admirals, &c. and such other persons as his majesty shall think fit, who shall have power " jointly or severally to commit, by warrant under the hand " and seal of them or any one of them, to safe custody, any " person against whom information of piracy, robbery, or " felony upon the sea shall be given upon oath: (which oath " they or one of them shall have power and are required to " administer), and to call and assemble a court of Admiralty on shipboard or upon the land, as occasion may require, which court shall consist of seven persons at least." And they shall proceed in the trial of such offenders in manner as set forth in the statute; and s. 10. declares that the stat. 28 H. 8. c. 15. shall continue in full force, any thing in the present act contained to the contrary notwithstanding.

This was calculated to save the trouble, expence, and delay of bringing offenders from remote places abroad to be tried in England.

Vi. ante, f. 4 6. 11 & 12 W. 3. c. 7. s. 8.

The same statute, after setting forth (s. 8.) that subjects committing piracies on other subjects under colour of foreign commissions shall be adjudged pirates, felons, and robbers; directs that on conviction according to the same act, or the said statute of Hen. 8. they shall suffer death and forfeiture of lands and goods. The same punishment is inflicted on all such as are directed to be adjudged pirates by the 9th section on conviction, according to the directions of the same act.

4 G. 1. c. 11. s. 7.

By stat. 4 Geo. 1. c. 11. s. 7. (*a*) " All and every person or " persons who shall commit any offence for which they ought " to be adjudged pirates, felons, and robbers by stat. 11 & " 12 W. 3. may be tried and judged for every such offence " according to the form directed by the stat. 28 H. 8., and " shall be excluded from their clergy."

8 G. 1. c. 24. s. 1. made perpetual by 7 G. 2. c. 28. s. 7. Ante,

And again, such as are declared pirates by st. 8 G. 1. c. 24. s. 1. are directed to be " tried, &c. according to the stat. " 28 H. 8. c. 11. and 11 & 12 W. 3. and being convicted shall " suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers on the seas ought to

(*a*) By s. 8. the act is not to extend to such as are convicted or attainted in Scotland; but by s. 9. it is to extend to all the King's dominions in America.

" suffer."

" ſuffer." And all offenders under the act are (by ſ. 4.) excluded clergy. Ch. XVII. § 13. *Trial and judgment.*

By ſtat. 18 Geo. 2. c. 30. the offenders therein mentioned " may be tried as pirates, felons, and robbers in the ſaid " court of Admiralty, on ſhipboard, or upon the land, in " the ſame manner as perſons guilty of piracy, felony, and " robbery are by the ſtat. 11 & 12 W. 3. c. 7. directed to be " tried; and on conviction ſhall ſuffer death and loſs of lands, " &c. as any other pirates, felons, and robbers ought to ſuffer " by virtue of the ſtat. 11 & 12 W. 3. or any other act." 18 G. 2. c. 30. Ante, ſ. 5.

Thoſe who were deemed pirates by the ſtat. 32 Geo. 2. c. 25. are on conviction to ſuffer death and loſs of lands, goods, and chattels as pirates, &c. according to the laws then in being. Ante, ſ. 9.

§ 14. *Trial of acceſſaries.*

In regard to the trial of acceſſaries, the ſtat. 11 & 12 W. 3. c. 7. before referred to, after ſetting forth who ſhould be adjudged acceſſaries to piracy, enacts, " That ſuch acceſ- ſaries ſhall and may be inquired of, tried, heard, determined, and adjudged, after the common courſe of the laws of this land, according to the ſtat. 28 H. 8. c. 15. as the principals of ſuch piracies and robberies, may and ought to be, and no otherwiſe; and being thereupon attainted, ſhall ſuffer ſuch pains of death, loſs of lands, goods, and chattels, and in like manner as the principals of ſuch piracies, robberies, and felonies ought to ſuffer, according to the ſaid ſtat. 28 H. 8. which is hereby declared to be in full force; any thing in this act to the contrary notwithſtanding." But the ſtat. 8 Geo. 1. c. 24. ſ. 3. reciting that " whereas there are ſome " defects in the laws for bringing perſons who are acceſ- " ſaries to piracy and robbery upon the ſeas to condign pu- " niſhment, if the principal who committed ſuch piracy or " robbery is not or cannot be apprehended and brought to " juſtice; enacts, that all perſon or perſons whatſoever who " by ſtat. 11 & 12 W. 3. are declared to be acceſſary or ac- " ceſſaries to any piracy or robbery therein mentioned, are " hereby declared to be principal pirates, felons, and rob- " bers, and ſhall and may be inquired of, heard, deter- " mined, and adjudged in the ſame manner as perſons " guilty of piracy and robbery may, according to that ſta- " tute, and being thereupon attainted and convicted, ſhall " ſuffer 11 & 12 W. 3. c. 7. ſ. 10. Ante, ſ. 11. 8 G. 1. c. 24. ſ. 3. *Acceſſaries may be tried as principals.*

Ch. XVII. § 14. *Trial and judgment.*

" ſuffer death and loſs of lands, &c. in like manner as pi-
" rates and robbers ought by the ſaid act to ſuffer." And by ſ. 4. " all ſuch offenders are excluded the benefit of
" clergy."

Scadding's caſe, M. 6 Jac. 1. Yelv. 134. and *vide* Cro. Eliz. 685.

On return to an habeas corpus, in the caſe of one Scadding, who had been committed to the Marſhalſea by the court of Admiralty, the cauſe appeared to be for aiding and abetting one Exon, who was indicted for piracy, to eſcape out of priſon; whereupon all the court held that though the fact were committed by Scadding within the body of the county, yet becauſe it depended on the piracy committed by Exon, of which the temporal judges had no cognizance, and was as it were an acceſſorial offence to the firſt piracy, which was determinable by the admiral, they remanded the priſoner. And it was ſoon after fully ſettled in the Admiralty caſe, that one who knowingly receives and abets a pirate within the body of a county was not triable by the common law, the original offence being cognizable alone by another juriſdiction.

13 Co. 53.

§ 15. *Clergy.* 1 Hale, 664 3 Hale, 369, 370. 3 Inſt. 113.

Clergy being expreſsly taken away in caſe of piracy by the ſtat. 28 H. 8. c. 15. is not reſtored by the ſtat. 1 Ed. 6. c. 12. for no clergy was allowable for this offence at common law before the 1 H. 8. and conſequently it is not touched by the ſtat. of Ed. 6. (*a*) But even if clergy were firſt taken away from it by ſtat. 28 H. 8. c. 15, yet as the ſtat. 1 Ed. 6. reſtores it only in " all other caſes of *felony*," than thoſe therein mentioned; and as piracy is not felony, nor noticed as ſuch by the common law, the ſtat. 28 H. 8. ſtill remains in force as to that offence: although in other reſpects as to felonies committed upon the high ſea, in which clergy was reſtored by the ſtat. 1 Ed. 6. if committed upon the land, the party ſhall have the ſame benefit, though the proceeding be upon the ſtatute 28 H. 8.; and therefore with regard to all other offences than piracy (which includes all acts made piracy by ſubſequent ſtatutes, and thereby ouſted of clergy),

(*a*) *Vide* 2 Hawk. ch. 33. ſ. 41. which diſtinguiſhes between ſuch piracies as are committed on the high ſea and thoſe committed in creeks and rivers within the body of a county, the latter of which he thinks within the reſtoring clauſe of the ſtat. 1 Ed. 6. which diſtinction he intimates will reconcile 11 Rep. 31. b. with the other authorities.

triable

triable by the ſpecial commiſſioners under that ſtatute, in as much as the marine law does not allow of clergy in any caſe, if it appeared upon the evidence that the fact would, if done upon land, have amounted to no more than felony within clergy, the practice till of late was for the Judges, in favour of life, to direct the jury to acquit the priſoner. But now this is otherwiſe ordered by the ſtat. 39 Geo. 3. c. 37. which, reciting the ſtat. 28 H. 8. c. 15., and the offences thereby directed to be tried under the King's commiſſion, and that it would be "expedient to declare that other offences committed on the ſeas may be inquired of, tried, and determined, in like manner," "enacts and declares, that all "and every offence and offences, which after the paſſing of "the act (10th of May 1799) ſhall be committed upon the "high ſeas, out of the body of any county of this realm, "ſhall be, and are hereby declared to be offences of the "ſame nature reſpectively, and to be liable to the ſame pu-"niſhments reſpectively, as if they had been committed "upon the ſhore; and ſhall be inquired of, heard, tried, "and determined and adjudged in the ſame manner as "treaſons, felonies, murders, and confederacies are direct-"ed to be by the ſame act."

Ch. XVII. § 15. *Clergy.*

Foſt. 288. 2 MS. Sum. 294.

39 G. 3. c. 37.

Vide ante, 218. tit. Homicide, ſ. 4.

§ 16. *Trial, when and where.*

The ſtat. 32 Geo. 2. c. 25. ſ. 20. "for the more ſpeedy bringing of offenders to juſtice," &c. enacts, that "a ſeſſion "of oyer and terminer and gaol delivery for the trial of of-"fences committed upon the high ſeas, within the juriſdic-"tion of the Admiralty of England, ſhall be holden twice at "leaſt in every year, viz. in March and October at the Old "Bailey, (except when the ſeſſions of oyer and terminer and "gaol delivery for London and Middleſex ſhall be there "holden;) or in ſuch other places in England as the lord "high admiral, &c. ſhall, in writing under his hand, directed "to the Judge of the court of Admiralty, appoint."

Vide ante, ſ. 9. note *a*.

Commiſſioners and juſtices of peace to take informations of witneſſes, and commit pirates.

By ſ. 21. any of the commiſſioners named for the time being, and every juſtice of peace within England, are empowered to take informations of witneſſes in writing upon oath, touching any piracy, felony, or robbery done upon the ſea, &c. or place where the admiral has juriſdiction; and, by warrant under his hand and ſeal, to cauſe the parties accuſed to be apprehended and committed to the gaol of the

Vide ante, ſ. 9. note *a*.

Ch. XVII. §16. *Trial, &c.*

county or place where the information ſhall be taken, till diſcharged by due courſe of law. And by ſ. 22. ſuch commiſſioner or juſtice may oblige every perſon, whom he ſhall judge neceſſary, to proſecute and give evidence againſt the party ſo committed, to enter into recognizance in a ſufficient penalty to appear at the then next ſeſſion of oyer and terminer and gaol delivery to be held for the juriſdiction of the admiralty of England, there to proſecute and give evidence &c.; and he may commit any perſon refuſing to enter into ſuch recognizance until ſuch next ſeſſions, or till he ſhall enter into ſuch recognizance: and ſuch recognizance ſhall be returned to the regiſter of the court of Admiralty.

Finding bill.
4 Blac. Com. 269.
3 Inſt. 114.

In proſecutions of this ſort, the indictment is firſt found by a grand jury of 12 men, and afterwards tried by another jury, as at common law. The ſtat. 28 H. 8. c. 15. and other ſtatutes declare, that "the offence ſhall be heard and "determined after the common courſe of law uſed for fe-"lonies and robberies upon the land," and that there ſhall be no challenge for the want of hundredors.

Standing mute.
1 Hawk. ch. 37. ſ. 9.
3 Inſt. 114.

It was ſettled that an offender ſtanding mute on an arraignment under the ſtatute 28 H. 8. ſhould have judgment of pain, *forte et dure*, the offence being to be heard and determined *after the common courſe of the law*, &c. But now by

12 G. 3. c. 20.

the ſtat. 12 Geo. 3. c. 20. "if any perſon, being arraigned "on any indictment for piracy, ſhall, upon ſuch arraign-"ment, ſtand mute, or will not directly anſwer to the pi-"racy, he ſhall be convicted of the ſame; and the court, "before whom he ſhall be ſo arraigned, ſhall thereupon "award judgment and execution againſt ſuch perſon in the "ſame manner (and attended with the ſame conſequences) "as if he had been convicted, by verdict or confeſſion, of "ſuch piracy." This, by ſ. 2., ſhall extend to the colonies

2 MS. Sum. 286.

and plantations in America. And ſuch is the courſe of proceeding under the commiſſion.

Form of judgment.
1 Hale, 100.
3 Inſt. 113.
1 Hawk. ch. 37. ſ. 2.

Since the ſtat. of treaſons 25 Ed. 3. the ſame judgment is given in piracy as in other caſes of felony; though before that, it was (in the caſe of a ſubject,) to be drawn and hanged, as for petit treaſon. And a forfeiture is incurred

Forfeiture.
Vide ante, ſ. 3.

of lands and goods.

CHAP. XVIII.

CHEATS.

Diſtinction between *Cheats* and *Larceny*. - § 1.

I. *Cheats at Common Law*. - - § 2.

Are either Frauds relating to ſome Matter of *public* Concern; or in regard to *private* Concerns, ſuch as are effected by *Conſpiracy*, *Forgery*, or *falſe Tokens* calculated to deceive the Public in general. *ib.*

But defrauding one in a private Contract, by falſely affirming a Thing to be of a ſuperior Quantity or Quality than it is, not indictable. *ib.*

Nor giving the Party's own Order in Writing (of no Value) for Payment of Money: nor putting his own Mark on Goods: theſe reſolving themſelves into no more than his own Aſſertion. *ib.*

But cheating by means of falſe *public Tokens or Marks* indictable. - - - - § 3.

As by falſe Weights or Meaſures: ſelling Cloth marked with a counterfeit Alneager's Seal; or other known general Mark in the Trade. *ib.*

So playing with falſe Dice, &c.

So Cheats committed in *Matters of public Concern*. § 4.

As doing judicial Acts in the Names of others. *ib.*

Supplying Priſoners of War with unwholeſome Food. *ib.*

Obtaining the King's Bounty, under Pretence of liſting as a Soldier, by an Apprentice liable to be reclaimed by his Maſter. *ib.*

Private Cheats effected by *Conſpiracy* or *Forgery* indictable. - - - - - § 5.

As conſpiring to ſuppreſs a Will; to read over a Deed wrongly which was about to be executed; to run a

colluſive Race to cheat a third Perſon; for pretending to be the one a Wine Merchant the other a Broker, and bartering pretended Wine for other Goods. - - - - - - §5.

Pretending to be and obtaining Credit as a Merchant by Means of *forged* Letters and Commiſſions. §6.

But Forgery not indictable as a Cheat without actual Prejudice enſuing. *ib.*

II. *By Statute.* - - - - §7.

1. By Stat. 33 H. 8. c. 1. falſely and deceitfully obtaining *Money*, *Goods*, &c. or other Things, by Colour and Means of any *privy Token* or *counterfeit Letter* in *other Men's Names*, &c. puniſhable by Impriſonment, Pillory, or other corporal Pain. *ib.*

What are to be defined *Tokens* within the Statute. *ib.*

2. By Stat. 30 Geo. 2. c. 24. Perſons knowingly and deſignedly *by falſe Pretence* obtaining *Money*, *Goods*, &c. with Intent to cheat, deemed Offenders againſt Law and the public Peace, and on Conviction fined and impriſoned, or put in the Pillory, or publicly whipped, or tranſported for 7 Years. - §8.

What are falſe *Pretences* within the Statute. *ib.*

Obtaining Money under falſe Pretence of ſharing a ſuppoſed Bet before made, and which was to be decided the next Day. *ib.*

Or under Pretence of having been entruſted by one to take his Horſes from Ireland to London, and detained till his Money was expended. *ib.*

Or under Pretence by one employed to keep an Account of Work done by others, and receive the Amount, that more Work had been done than really was, and delivering a ſurcharged Account accordingly; for the falſe Pretence created the Credit. *ib.*

So obtaining the Price of the Carriage of Goods under Pretence he had loſt the Receipt for the Delivery of them. *ib.*

How far the Stats. of Hen. 8. and Geo. 2. vary from the common Law, or each other. - - §9.

They are confined to obtaining *Money* or *Goods*. *ib.*

Q. As to *Choſes in Action* ſince Stat. 2 G. 2. c. 25. § 9.
Stat. 33 H. 8. confined to *Tokens* and *Letters* in the Name of a *third* Perſon. Q. Whether 30 Geo. 2. ſo confined. *ib.*
Stat. 33 H. 8. extending to *priuy* Tokens ſeems an Enlargement of the common Law, which required Tokens having Semblance of *public* Authenticity, and thereby calculated to deceive People in general. *ib.*
Yet general Authorities do not diſtinguiſh. *ib.*
Statutable Proviſions againſt Frauds by particular Perſons conſidered before. - - - § 10.
Frauds by Bankrupts poſtponed. *ib.*
South-Sea and other Bubbles, &c. *ib.*
Retailers having in Poſſeſſion falſe Weights and Balances puniſhable ſummarily by Stat. 37 Geo. 3. c. 143. *ib.*
3. By Stat. 13 Eliz. c. 5. Parties to fraudulent Deeds, Alienations, Judgments, and Executions, ſhall, beſides a Penalty to the Party grieved, ſuffer Impriſonment for half a Year on Conviction. - § 11.
Extended to Conveyances, &c. to deceive Purchaſers by Stat. 27 Eliz. c. 4. *ib.*
4. By Stat. 9 Ann. c. 14. cheating at or with Dice, Cards, &c. liable to Forfeiture, Infamy, and corporal Puniſhment. - - - - - § 12.

III. *Form of Indictment.* - - § 13.

Indictment at common Law, or on Stats. 33 H. 8. and 30 Geo. 2. muſt ſhew what falſe Tokens or Pretences were uſed, and aver that they were falſe, but no technical Form of Words is neceſſary. *ib.*
All preſent and concurring may be charged with the ſame Cheat. *ib.*

IV. *Puniſhment.* - - - § 14.

At common Law, by Fine, Impriſonment, and other corporal Puniſhment. By Stat. 33 H. 8. c. 1. by corporal Puniſhment only. By Stat. 30 Geo. 2. c. 24. by Fine, corporal Puniſhment, or Tranſportation for 7 Years.
No Reſtitution of Goods in any Caſe.

Cheats.

§ 1. *Distinction between cheats and larceny.*

IN treating of the subject of Larceny in a prior chapter I had occasion to enter at large into the distinction between such fraudulent taking of the property of another as the law denominates *felonious*, and such as wanting that ingredient amounts only to misdemeanor. Upon reviewing the authorities there collected it will appear that the distinction so far as regards the subject of the present inquiry turns mainly upon the consideration whether or not the owner deceived by appearances intended to part with the absolute *property*, and not barely with the *possession* or *temporary use* of the thing at the time of the delivery, rather than upon any actual difference in the degree of fraud meditated by the taker, the intent in both instances being dishonestly to acquire and convert to his own use the property of another without any or an adequate consideration. If the absolute property were intended to be passed by the delivery, but such delivery were obtained by means of a *false token* or *pretence*, the case can only be reached in the first instance by a prosecution for a cheat either at common law or by help of the stat. 33 H. 8. after-mentioned, or in the instance of a false pretence by the stat. 30 G. 2. Where indeed the possession is honestly obtained upon a contract or trust in the first instance, the subsequent dishonest conversion of it, (except in cases where the privity of contract is determined) is no other than a breach of trust, for which the party injured has a civil remedy.

Vide ante, 665. 8.

Ante, 655.

Ante, 693.

The distinction above mentioned was particularly adverted to by Eyre B. in the debate on Pear's case in 1779, and seems to have been the ground of the resolution in Atkinson's case in the same year, and in Coleman's case in 1785, and in other cases classed with those.

Ante, 686-9.

Ante, 673.

§ 2. *Cheats at common law.*

It is not however every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law; but in order to constitute it such, according to the doctrine in Wheatly's case, Young's case, and other authorities, it must be such as affects the public; such as is public in its nature, calculated

Rex v. Wheatly, 2 Burr. 1125. R. v. Young, 3 Term Rep. 104. 6 Mod. 42.

calculated to defraud numbers, to deceive the people in general. And this is inſtanced not only by precedents of cheats effected by conſpiracy, to which may be added forgery (*a*), which are in themſelves ſubſtantive offences, though the cheats thereby intended be not fully carried into effect; but alſo, as it is ſtated generally, by ſuch as are effected by means of falſe tokens. Yet theſe latter, being alſo put by way of example, muſt ſtill, as it ſeems, be underſtood of ſuch falſe tokens as affect the public at large, ſuch as are calculated to defraud numbers, to deceive the people in general; of which the common inſtance referred to is the cheating by means of falſe weights and meaſures, againſt which it is ſaid that ordinary care or prudence is not ſufficient to guard. It does not diſtinctly appear that the inſtances ſo put in argument, of cheats effected by means of falſe tokens generally, were intended to be applied indiſcriminately to offences at common law (*b*) as well as by ſtatute; but ſuch expreſſions ſeem rather to have been uſed concerning cheats in general which were the ſubject matter of an indictment, which would of courſe comprehend thoſe included in the ſtat. 33 H. 8. And in R. v. Young and others, Buller J. diſtinguiſhing between cheats at common law and by ſtatute, refers thoſe which are effected by means of *falſe tokens* in general to the ſtat. 33 H. 8. to which it ſhould ſeem from the expreſs wording of the preamble and the neceſſary inference therefrom that they peculiarly belong. It may therefore be doubted whether the deſcription given by Hawkins of this offence, that it conſiſts in "deceitful practices in defrauding or *endeavouring* to "defraud another of his known right by means of ſome *artful* "*device* contrary to the plain rules of common honeſty," be ſufficiently accurate or diſtinct to be taken as a definition of

Vide poſt. ſ. 4. and ſeveral precedents of indictments for public cheats in Crown Circ. Comp. 75, &c.

Vide poſt. ſ. 9: *Vi.* R. v. Wheatly, 2 Burr. 1127. 1 Hale, 506. R. v. Young and others, 3 T. Rep. 104.

Vi. poſt. ſ. 9.

Vide 1 Hawk. ch. 71. ſ. 1.

(*a*) *Vide* poſt. ſ. 6. and Crown Cir. Comp. 37. tit. Deceit; et ib. 38. and R. v. Baker, Trem. P. C. 96. and R. v. Saunders, ib. 100. R. v. Foulſon, ib. 103. and R. v. Farmer, ib. 109.

(*b*) There is however a dictum in R. v. Wood, M. 24 Car. in Sty. 145. to this effect. It was an indictment for getting another's horſe into his poſſeſſion by uſing another man's name and *a falſe token*. It was objected, 1. that it was not laid contra ſtatutum; but to this the Court anſwered that it was an offence at the common law. 2. That it did not ſhew what the falſe token was, nor in whoſe name it was uſed. It was not, however, quaſhed for thoſe defects, but for another which Rolle C. J. took, viz. that it was only laid that the defendant did the fact *nuper*. Little ſtreſs can be laid upon ſuch an authority; for it is now clearly ſettled that the falſe token muſt be ſhewn. *Vide* alſo R. v. Wanſbrough, Trem. P. C. 104. where there was merely a falſe affirmation. Et quære.

Ch. XVIII § 2. *At common law.*

the offence at common law. I ſhould rather ſay that it conſiſts in the fraudulent obtaining the property of another by any deceitful and illegal practice or token (ſhort of felony) which affects or may affect the public. But the offence is now enlarged by the ſtatutes 33 H. 8. and 31 Geo. 2. after mentioned.

Wheatly's caſe, ante, 817.

In Wheatly's caſe the indictment, which was at common law, was againſt a brewer, for that he intending to deceive and defraud R. W. of his money, falſely fraudulently and deceitfully ſold and delivered to him 16 gallons of amber for and as 18 gallons of the ſame liquor, and received 15 s. as for the 18 gallons, knowing there were only 16 gallons. This the Court were clearly of opinion was not an indictable offence, but only a civil injury for which an action lay to recover damages (*a*). Lord Mansfield C. J. ſaid, "it amounts only to an unfair dealing and an impoſition on this particular man by which he could not have ſuffered but from his own careleſſneſs in not meaſuring it; whereas fraud to be the object of criminal proſecution muſt be of that kind which in its nature is calculated to defraud numbers, as falſe weights or meaſures, falſe tokens, or where there is a conſpiracy."

MS. Dunning.

R. v. Channell, H. 1 G. 2. 2 Stra. 793. 1 Seſſ. Caſ. 366. *Vide* Lawe v. King, 2 Saund. 81.

So where an indictment charged Channell for that he keeping a common griſt mill, and being employed by W. B. to grind three buſhels of wheat, did with force and arms unlawfully take and detain forty-two pounds weight of the wheat: upon demurrer (*b*) it was adjudged for the defendant; there being no actual force laid; nor any charge of taking, as for unreaſonable toll; but being a private matter for which trover would lie.

1 Hawk. ch. 71. ſ. 2. Pinkney's caſe, E. 6 G. 2. B. R. Maſterman's Notes, and 1 Seſſ. Caſ. 198. cited by Wilmot J. in 2 Burr. 1129. R. v. Duffield, Sayer, 146. S. P.

It is equally clear that ſuch a private cheat is not indictable, though it be accompanied by a falſe aſſertion to give it efficacy. As in Pinkney's caſe, where an indictment for ſelling a ſack of corn at Rippon market, which the defendant falſely affirmed to be a Wincheſter buſhel, whereas it was greatly deficient, was quaſhed upon motion; being, as

(*a*) The ſame was ruled by Lord Raymond C. J. in R. v. Nicholſon at the ſittings M. 4 Geo. 2. upon an indictment for the defendant's having delivered ſo many buſhels leſs than he had contracted for, for which he ſaid the party had his remedy by action. Maſterman's notes.

(*b*) No ſtreſs can be laid on ſeveral caſes to be found in the books, particularly in Mod. Reports, where ſimilar indictments were refuſed to be quaſhed on motion, becauſe it was the practice of the Court, as often declared, not to quaſh, on motion, indictments for offences founded in fraud or oppreſſion, but leave the defendants to plead. 5 Mod. 13. 8 Mod. 42. 12 Mod. 499.

the

the Court said, no more than telling a lie: or as where Lewis was indicted at common law for a cheat in depositing as a security for money advanced a quantity of gum, instead of and affirming it to be gum seneca, and afterwards selling the same to the prosecutor, and affirming it to be so, and to be worth 7l., whereas it was worth but 3l. Judgment was arrested without cause shewn; being no more than a false affirmation, for which the party was not indictable unless he came with false tokens. Or where Jones obtained money of another, by pretending to come by the command of a third person to demand a debt or the like in his name; shewing no voucher or token for his authority; it was holden not indictable, for it was the party's own fault to trust him. So in Bryan's case, who obtained goods from a tradesman by pretending that she was sent by her mistress who was his customer.

Ch. XVIII. § 2. *At common law.*

R. v. Lewis, E. 28 Geo. 2. MS. Dunning. *Vi.* Sayer, 205.

Jones's case, Salk. 379. and *vide* R. v. Gibbs, 1 East's Rep. 185.

Bryan's case, 2 Stra. 866. 2 Sess. Cas. 23.

Neither will the case differ if the defendant make use of an apparent token, which in reality is upon the very face of it of no more credit than his own assertion. As where an indictment at common law charged that Lara, deceitfully intending by crafty means and devices to obtain possession of certain Lottery Tickets the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him Lara, &c. purporting to be a draft upon his banker for the amount, which he knew he had no authority to draw, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid; by virtue of which he obtained possession of the tickets, and defrauded the prosecutor of the value. Judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit; for the banker's check drawn by the defendant himself entitled him to no more credit than his bare assertion that the money would be paid. Of the same nature was the case of Wilders, a brewer, who was indicted for a cheat in sending to one Hicks a publican so many vessels of ale marked as containing such a measure, and writing a letter to Hicks assuring him that they did contain that measure, when in fact they did not contain such measure, but so much less, &c. The indictment was quashed upon motion, as containing no criminal charge. Yet this

Rex v. Lara, 6 Term Rep. 565.

Rex v. Wilders, M. 6 G. 1. B. R. cited by Lord Mansfield in 2 Burr. 1128.

Ch. XVIII. § 3 *At common law.*

was thought by the Court in Rex v. Wheatly a ſtrong caſe; and Mr. Juſtice Foſter doubted it, becauſe he conſidered that the veſſels, being marked as containing a greater quantity than they really did, were *falſe tokens*. Poſſibly however the Court in deciding the caſe of Wilders thought that thoſe marks not having even the ſemblance of any public authority, but being merely the private marks of the dealer, did in effect reſolve themſelves into no more than the dealer's own affirmation that the veſſels contained the quantity for which they were marked.

§ 3. *Uſing falſe public tokens.*

3 MS. Sum 53. R. v. Burgoyne, 1 Sid. 409.

But if in any of theſe caſes the cheat be effected by means of falſe weights or meaſures, (which are known public tokens) it is then clearly indictable; for theſe betoken a general deſign to defraud; they are inſtruments or tokens purpoſely calculated for deceit, and by which the public in general may be impoſed upon without any imputation of folly or negligence. This reaſoning applies to all caſes where any other ſpecies of falſe token having the ſemblance of public authenticity, is uſed. As in Edwards's caſe, where cloth was ſold with the Alneager's ſeal counterfeited thereon: or as in Worrel's caſe, where there was a general ſeal or mark of the trade on cloth of a certain deſcription and quality which was deceitfully counterfeited. If, ſaid the Court in Pinkney's caſe before mentioned, the defendant had meaſured the corn in a buſhel, and had put any thing into the buſhel to help to fill it up, or had meaſured it in a buſhel ſhort of the ſtatute meaſure, it might have been indictable. Yet in Bowers's caſe (*a*) the knowingly expoſing to ſale and ſelling wrought gold under the ſterling alloy as and for gold of the true ſtandard weight, (which would be indictable in goldſmiths under the ſtatute,) was holden not indictable at common law in the caſe of a common perſon, the ſale not being by any falſe weight or meaſure (*b*). To the above-mentioned principle may alſo be referred the inſtances of cheats by means of playing with falſe dice, &c.; which is further puniſhable by penalties recoverable under the ſtatute 16 Car. 2. c. 7. and 9 Ann. c. 14. by forfeiture of treble the value of the money or other thing won, to be recovered as the act directs.

R. v. Edwards, E. 35 Car. 2. Trem. P. C. 103. Rex v. Worrel, ib. 106.

Pinkney's caſe, MS. ante, 818.

R. v. Bower, Cowp. 323.

(*Vi.* R. v. Bonny, Trem. P. C. 106.)

Maddock's caſe, 2 Roll. R. 107. S. P. Cro Jac. 497. 2 Roll. Abr. 78.

(*a*) The ſale there was by the ſervant of the defendant: but the Court agreed that the maſter was reſponſible for the act of the ſervant done in the courſe of his employment, and within the ſcope of his authority.

(*b*) Qu. if falſe ſtamps or marks be uſed, ſuch as are required by ſtatute on plate of a certain alloy?

There

Ch. XVIII. § 4. *At common law.*

There is alſo another head of public cheats, indictable at common law, which are levelled againſt the public juſtice of the kingdom. Such as the doing judicial acts without authority in the name of another. But moſt of theſe are now made felony by the ſtatutes 21 Jac. 1. c. 26. and 4 W. & M. c. 4. There is a precedent of an indictment againſt a married woman for pretending to be a widow, and as ſuch executing a bail-bond to the ſheriff for one arreſted on a bailable writ. This perhaps was conſidered as a fraud upon a public officer in the courſe of juſtice.

§ 4.

Cheats in matters of public concern. Cro Eliz 531. 1 Mod. 46. T. Jones, 64. 1 Stra. 384. *Vide* tit. *Falſe perſonating.* R. v Blackburn, M. 36 Car. 2. Trem. P.C. 101. Cro Cir. Comp. 78.

So all frauds affecting the crown and the public at large are indictable, though ariſing out of a particular tranſaction or contract with the party. This was admitted by the very terms of the objection in the following caſe.

Treeve's caſe, Cornwall Sum. Aſſ. 1796. MS. Buller J. & MS. Jud. *Indictment lies for wilfully deceitfully and maliciouſly ſupplying priſoners of war with unwholeſome food not fit to be eaten by man.*

The indictment charged that the defendant Treeve, a common brewer, on 27th April, 35 Geo. 3. at, &c. knowingly wilfully deceitfully and maliciouſly did provide furniſh and deliver to and for 800 French priſoners of war, whoſe names are unknown, and there being under the protection of the king, confined in a certain hoſpital called Eaſtwood hoſpital in the pariſh and county aforeſaid divers large quantities, to wit, 500lb. weight of bread to be eaten as food by the ſaid French priſoners of war, ſuch bread being then and there made and baked in an unwholſome and inſufficient manner, and then and there being made of and containing dirt, filth, and other pernicious and unwholeſome materials and ingredients not fit to be eaten by man; and the ſaid defendant then and there well knowing the ſaid bread to be baked in an unwholeſome and inſufficient manner, and to be made of and to contain dirt filth and other pernicious and unwholſome materials and ingredients, not fit to be eaten as aforeſaid; whereby the ſaid priſoners of war did then and there eat of the ſaid bread, and thereby then and there became diſtempered in their bodies and injured and endangered in their healths; to the great damage of the French priſoners, to the great diſcredit of our ſaid Lord the King, to the evil example, &c. and againſt the peace, &c. There were eight other counts in the indictment charging the offence to have been done at different times, and at different priſons.

After conviction, it was objected in arreſt of judgment that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with

Ch. XVIII. §4. *At common law.*

the public or of any moral or civil duty; and judgment was reſpited to take the opinion of the Judges. But in Michaelmas term 1796 they all held the conviction right.

The defendant in the above caſe was in fact a contractor with government for the ſupplying of proviſions to the French priſoners in the neighbourhood of Plymouth in the courſe of the then war; though that was not ſtated in the indictment on which the conviction took place. Nor was it material ſo to ſtate it, otherwiſe than as matter of aggravation if ſuch a caſe wanted any: for the giving of any perſon unwholeſome victuals not fit for man to eat, lucri cauſâ, or from malice or deceit, is undoubtedly in itſelf an indictable offence, apart from any other conſideration, which entered deeply into the demerits of the defendant's conduct.

Vide 4 Blac. Com. 162.

Rex v. Jones, Coventry Lent Aſſ. 1777. cor. Nares J. MS. Gould J. (1 Leach, 208. S. C.)

Obtaining the King's bounty for enliſting as a ſoldier by an apprentice reclaimable by his maſter.

An indictment charged that Joſeph Jones was an apprentice bound by indenture to ſerve one William Lucas, a jobbing ſmith, for the then remainder of a term of 7 years commencing from, &c. and that defendant intending fraudulently and unjuſtly to obtain money from the paymaſter of his majeſty's 7th regiment of foot to defraud the King of divers ſums of money, afterwards on, &c. unlawfully fraudulently and deceitfully cauſed and procured himſelf without the conſent of his maſter W. L. to be enliſted into the ſaid 7th regiment of foot as a ſoldier, by means whereof he the defendant unlawfully fraudulently and deceitfully received and obtained from the paymaſter of the ſaid regiment divers ſums of money amounting in the whole to the ſum of 3l. 8s.; he the defendant at the time of his enliſting into the ſaid regiment and during his continuance therein then and there well knowing himſelf to be by the laws of this realm without the conſent of his maſter the ſaid W. L. diſqualified from ſerving as a ſoldier in the ſaid 7th regiment of foot, to the great deceit fraud and damage of the King, and againſt the peace, &c.

The facts were all plainly proved, except as to the indenture; and that was produced at the trial by the maſter, who proved the execution of it, and claimed his apprentice under it; but neither of the two ſubſcribing witneſſes were produced; which upon reference to the Judges after conviction was holden to be neceſſary in order to warrant the conviction.

Eaſter Term 1777.

In

Ch. XVIII. § 5. *At common law.*

§ 5. *Private cheats effected by conspiracy, or forgery. Vide* many precedents in Trem. P. C. from p 85. to 110. & ante, 817.

In addition to those above-mentioned there are also instances to be found in the books of cheats in their nature private; which have been yet adjudged to be indictable at common law: but upon examination they will either appear to be founded in conspiracy or forgery; or as in some of the instances before put to implicate considerations of public justice, public trade, or public policy. They are subsequent to the stat. 33 H. 8. but prior to that of the 30 G. 2. Thus it is said by Hawkins, that the suppression of a will is indictable as a cheat; for which he cites Noy 103. What the form of the count was in that case does not appear by the report; but as there were several persons convicted on the information filed against them by the Attorney-General, it is probable that they were charged with a conspiracy or combination. The same may be said of the case of Skirret and others, who were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written. So of Orbell's case, who was convicted upon a charge of having run a foot-race fraudulently and with a view to cheat a third person by a previous understanding with the running competitor to win.

1 Hawk. ch. 71. s. 1.

Rex v. Breerton and others, Noy, 103.

Rex v. Skirret and others, 1 Sid. 312 Rex v. Parris and others, ib. 431.

Rex v. Orbell, 6 Mod. 42.

The case of Macarty and Fordenbourgh has been too generally quoted to be passed over without particular notice. The indictment charged that the defendants, falsely and deceitfully intending to defraud T. C. of divers goods, together deceitfully bargained with him to barter sell and exchange a certain quantity of pretended wine as good and true new Portugal wine of him the said F. for a certain quantity of hats of him the said T. C.; and upon such bartering, &c. the said F. pretended to be a merchant of London, and to trade as such in Portugal wines, when in fact he was no such merchant, nor traded as such in wines; and the said M. on such bartering, &c. pretended to be a broker of London, when in fact he was not: and that T. C. giving credit to the said fictitious assumptions personating and deceits did barter sell and exchange to F., and did deliver to M., as the broker between T. C. and F., for the use of F., a certain quantity of hats of such a value for so many hogsheads of the pretended new Portugal wine; and that M. and F. on such bartering, &c. affirmed that it was true new Lisbon wine of

Regina v. Macarty and Fordenbourgh, 2 Ld. Ray. 1179. and 3 Ld. Ray. 487. *Two effect a cheat, by the means of the one pretending to be a merchant and the other a broker, and as such bartering pretended wine for hats.*

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Portugal, and was the wine of F., when in fact it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to F.; to the great deceit and damage of the said T. C. and against the peace, &c. The indictment, which was for a cheat at common law, though it did not charge that the defendants *conspired* eo nomine, yet charged that *they together, &c. did the acts* imputed to them, which might be considered to be tantamount: but it was thought to be a case of doubt and difficulty. One report of the case in Modern says that it was adjourned; and no further account is given of it. In Wheatly's case, as reported in Blac. Rep., Mr. Justice Denniſon is made to say that the indictment in Macarty's case was quashed because there was no false token; though this is not supported by the report of the same case in Burrow; for the same learned Judge is there made to say that there were false tokens, or what were considered as such. In truth, on searching the rolls it appears that judgment was at last given for the Queen in Mich. 4 Ann. (*a*) But the true ground of that judgment, which was given by Mr. Justice Denniſon in Wheatly's case (*b*), was that it was a *conspiracy;* and not the ground alluded to in the printed report of Govers's case; where speaking of Mackarty's case Lord C. J. Ryder is made to say, (borrowed probably from the report in 6 Mod.) "that *the pretending to be a merchant* was there holden to be a false token." Yet what was that but a false affirmation simply?

Vide post. tit. Conspiracy. 6 Mod. 301.

1 Blac. Rep. 275.

2 Burr. 1128.

(*a*) Ld. Raymond's Report says Trin. 4 Ann.

(*b*) MS. Dunning, and *vide* 2 Burr. 1129. and 6 Mod. 302.

§ 6. *Cheating by means of forged instruments.* Rex v Govers, E. 28 Geo. 2. Sayer. Rep. 206.

In the case of Govers the indictment charged that the defendant intending to cheat J. S. did deceitfully take upon himself the stile and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and in order to induce J. S. to believe the same and to give him credit, the defendant deceitfully *produced to J. S. several paper writings which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches and other goods, to the amount of* 4,000l.; by means whereof the defendant got into his hands two watches the property of J. S.: whereas in truth the defendant was not a merchant, and the paper writings *containing such commissions* were *false and counterfeit.* Here the indictment was sustained on the ground that besides pretending to be a merchant, the defendant produced several *forged* writings

writings as tokens, in corroboration of his assertion. It does not appear that the indictment contained any distinct averment that the paper writings, which the defendant *affirmed* to be commissions from Spain for goods, did purport on the face of them to be such: but the averment at the end might perhaps be thought equivalent. The principal observation however arising on this case is, that it is not stated in the report that the indictment concluded against the form of the statute; although the false tokens made use of come directly within the words of the statute of Hen. 8. Therefore if this were sustained as an indictment at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that the stat. of Hen. 8. was merely declaratory of the common law, is that the cheat was effected by means of a *forgery* (in which all are principals at common law); and that the publication of such forged instruments for the purpose of deceit was in itself a substantive offence indictable at common law.

It was not unusual formerly to prosecute forgeries, when successful, as cheats, before the various modern statutes by which in most instances they are now made capital felonies. In the report of Ward's case, in Strange, which was a case of forgery at common law of an acquittance, it was said that it could not be prosecuted *as a cheat* at common law *without an actual prejudice*; and that that was *an obtaining* on the statute 33 Hen. 8. This may serve to explain what was said in Micah Gibbs's case, where the Court held that the Quarter Sessions had no jurisdiction over the offence of forgery at common law; and that it being laid *as forgery*, they had no jurisdiction of it *as a cheat*. In that case the fraud was not successful; nothing was received by the defendant, nor any thing lost by the prosecutor. But in Hales's case, who was indicted for falsely and deceitfully *obtaining* 450l. of William Harle *by a false token*, viz. *a promissory note* (*a*) in the name of Robert Hales, payable to S. E. &c. with a *counterfeit indorsement* thereon. The Lord C. B. instructed the jury that if it appeared to be a forged indorsement, the instrument *being a false token*, the defendant must be found guilty. The

Ward's case, 2 Stra. 749. and *vide* R. v. Bryan, 2 Stra. 866. in R. v. Obrian, 13 Vin. Abr 460. 2 Seff. Cas. 22. & ante, 817. n. *a*.

Gibbs's case, 1 East. Rep. 173.

Wm. Hales' case, O. B. Jan. 1729, cor. Ld. C. B. Pengelly et al. Justs. 9 St. Tr. 75. and *vide* ib. 93. S. P.

(*a*) The defendant was indicted as for a misdemeanor at common law, being before the statute making the offence felony.

like

Ch. XVIII. § 6. *At common law.*

like was ruled on a similar indictment against the same defendant for defrauding another person. In Leander Fawcitt's case Eyre C. J. had no doubt that a counterfeit order (though void if genuine) which was effectual to procure a prisoner's discharge was indictable as a cheat; though he was not satisfied that the offence amounted to forgery.

Fawcitt's case, 1793, post. tit. Forgery, ch. 19. s. 7.

§ 7. *By statute.*

I shall now proceed to set forth the two statutes, namely, that of the 33 Hen. 8. c. 1. and 30 Geo. 2. c. 24. which have confirmed or extended the principles of the common law in regard to this offence; and also to observe on the cases wherein indictments for cheats have been sustained either at common law or by the aid of one or other of those acts.

33 H. 8. c. 1. *Cheats by privy tokens or counterfeit letters.*

The stat. 33 Hen. 8. c. 1. after reciting that evil-disposed persons devising how they might unlawfully get into their possession goods chattels and jewels of other persons have *of late* to avoid the punishment of theft falsely and deceitfully contrived and devised "*privy tokens* and *counterfeit letters in other men's names*" unto divers persons their special friends and acquaintances for the obtaining of money, goods, &c. of the same persons their friends and acquaintances, by colour whereof they have unlawfully obtained the same; enacts, "that if any person or persons falsely and deceitfully obtain or get into his or their hands or possession any money goods chattels jewels or other things of any other person or persons by colour and means of any such false token, or counterfeit letter made in any other man's name, as aforesaid; every such offender being thereof lawfully convicted by witnesses taken before the Lord Chancellor, or by examination of witnesses, or confession taken before the justices of assize in their circuits, or before justices of the peace in their general sessions, or by action in any of the King's courts of record, shall suffer such correction and punishment by imprisonment, setting upon the pillory, or other corporal pain, except pains of death, as shall be adjudged," &c. (saving by s. 4. to the party grieved his civil remedy); and by s. 3. as well the justices of assize, as also two justices of the peace (one of the quorum) may commit or bail offenders to the assizes in general sessions to answer the same.

What tokens within the statute.

A false "*privy token*" within the statute has generally been taken to denote some real visible mark or thing, as a key, a

ring, &c. A mere falſe affirmation or promiſe is certainly not ſuch; as was ruled in Munez's caſe, who perſuaded a woman who had a promiſſory note for 500l. to let him have it, under pretence that he had a friend in the houſe who would advance her money on it. How far the perſonating of another is ſuch was before conſidered. And though *writings* generally ſpeaking may be conſidered as *tokens*, yet they muſt be ſuch as are made in the names of *third* perſons; whereby ſome additional credit may be gained to the party uſing them; and not, as was holden in Lara's caſe before mentioned, the mere giving of the defendant's own draft on a banker, with whom he had no credit; which was conſidered as no more than his bare aſſertion that the money would be paid. Upon the ſame principle in Wilders's caſe, his own marks on the veſſels, denoting them to contain a greater quantity of liquor than they did, and his own letters affirming the ſame fact, were holden not to be falſe tokens. It ſeems then that the falſe token muſt be ſuch as is calculated to gain the party ſome additional credit and confidence beyond his own aſſertion, or that which is reſolvable into ſuch. This inquiry however is become leſs important from the following ſtatute.

Ch. XVIII. § 7. *By ſtatute* 33 H. 8. c. 1. *Falſe tokens.*

R. v. Munez, Hil. 13 Geo. 2. MS. Tracy, 142. 2 Stra. 1127. 7 Mod. 315. S. C.

R. v. Macarty, ante, 823.

Lara's caſe, ante, ſ. 2.

Wilders' caſe, ante, 819.

§ 8.

30 Geo. 2. c. 24. *Cheats by falſe pretences.*

In furtherance of the proviſions of the above ſtatute it is further enacted by ſtat. 30 Geo. 2. c. 24. ſ. 1. "That all "perſons who knowingly and deſignedly by falſe pretence "or pretences ſhall obtain from any perſon or perſons mo- "ney, goods, wares or merchandizes, with intent to cheat "or defraud any perſon or perſons of the ſame, ſhall be "deemed offenders againſt law and the public peace; and "the Court before whom ſuch offenders ſhall be tried ſhall "on conviction order them to be fined and impriſoned, or "to be put in the pillory, or publicly whipped, or be tranſ- "ported according to the laws made for the tranſportation "of offenders, &c. for the term of ſeven years, as the Court "ſhall think fit." And by ſ. 2. any juſtice of peace, before whom any perſon charged on oath with any ſuch offence ſhall be brought, may commit or bail the party to anſwer the complaint at the next general or quarter ſeſſions of the peace, or next ſeſſions of oyer and terminer, and ſhall bind over the proſecutors by recognizance in a reaſonable ſum

to

Ch. XVIII. § 8. *By ſtatute 30 Geo. 2. c. 24. Falſe pretences.*

to proſecute, or in a ſum not leſs than double the amount of the money or goods fraudulently obtained if they ſhall exceed 20 l. in value; and by ſ. 20. the certiorari is taken away (*a*).

Young's caſe, infra.

The term "*falſe pretences*" is of great latitude, and was uſed, as Aſhhurſt J. remarked in Young's caſe, to protect the weaker part of mankind, becauſe all were not equally prudent: it ſeems difficult therefore to reſtrain the interpretation of it to ſuch falſe pretences only againſt which ordinary prudence cannot be ſuppoſed ſufficient to guard. But ſtill it may be a queſtion whether the ſtatute extends to every falſe pretence, either abſurd or irrational upon the face of it, or ſuch as the party has at the very time the means of detecting at hand; or whether the words which are general ſhall be conſtrued co-extenſively with the cheat actually effected by means of the falſe pretence uſed. Theſe may perhaps be matters proper for the conſideration of the jury, with the advice of the Court; and I will not attempt to draw any preciſe line on the ſubject, the difficulty of doing which has been announced from high authority; but I ſhall content myſelf with referring to a recent caſe which may ſerve as a general comment on this branch of law.

Per Lord Kenyon C. J. in R. v. Young and others, infra.

Rex v. Young, Randal, Mullins, and Oſmer, 3 Term Rep. 98. *Obtaining money under the falſe pretence of ſharing a ſuppoſed bet ſaid to have been before laid with another, and which was to be decided the next day.*

An indictment was framed on the ſtat. 30 Geo. 2. againſt Young and others, the firſt count of which ſtated, that the defendants, fraudulently intending to obtain the money of the King's ſubjects by falſe colours and pretences, unlawfully and knowingly, &c. did falſely pretend to one Thomas, that Young had made a bet of 500 guineas on each ſide with a colonel in the army then at Bath, that one W. L. would on the next day run on the high road leading from Glouceſter to Briſtol 10 miles in length within one hour; and that Young and Mullins did go 200 guineas each in the bet, and Randal did go the other 100 guineas; and that under colour and pretence of ſuch bet they obtained from Thomas as a part of ſuch pretended bet 20 guineas of the 500 guineas: by which ſaid falſe pretences the defendants unlawfully, &c. obtained from the ſaid Thomas the ſaid 20 guineas, with intent to cheat and defraud him thereof; whereas in truth no ſuch bet had been made, &c. againſt the form of the ſtatute, &c. A ſecond count ſtated the bet to have been made between Young and Oſmer. It was ob-

(*a*) *Vide* Smith's caſe, Cowp. 24.

jected

jected in arrest of judgment, first, that the transaction itself was not the subject matter of a criminal prosecution; for that it did not affect the public; and it was such against which common prudence might have guarded; for being the representation of a *future* transaction, the party had an opportunity of inquiring into the truth of it, and therefore it was his own fault if he were deceived. Secondly, that the offence was not charged with sufficient certainty, inasmuch as the colonel's name was not mentioned. *Lord Kenyon* C. J. said, that the stat. 30 Geo. 2. c. 24. was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. The statute 33 H. 8. c. 1. required a false seal or token to be used, in order to bring defrauders into the confidence of the person imposed upon. But that being found to be insufficient the stat. 30 Geo. 2. c. 24. introduced another offence describing it in terms extremely general. That when the criminal law was auxiliary to the law of morality he did not feel any inclination to explain it away. Now this offence was within the words of the act; for the defendants had by false pretences fraudulently contrived to obtain money from the prosecutor, who perhaps too credulously gave confidence to them. As to the second objection; the charge was sufficiently certain to enable the defendants to know what they were called upon to answer for. Perhaps the colonel's name with whom the wager was stated to have been made was not mentioned; so that he could not have been described with greater accuracy. But if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence. *Ashhurst* J. observed that the legislature were aware that all men were not equally prudent, and that the stat. 30 Geo. 2. was passed to protect the weaker part of mankind. The words of it were very general, and the Court could not restrain their operation. *Buller* J. in commenting on the operation of the statute 30 Geo. 2. said that it clearly extended to cases which were not the subject of an indictment at common law or by the stat. 33 H. 8. That the ingredients of this offence were the obtaining money by false pretences and with an intent to defraud:

Ch. XVIII. § 8. *By statute 30 Geo. 2. c. 24. False pretences.*

Vide ante, 817. for further observations on these statutes.

Ch. XVIII § 8. *By ſtatute 30 Geo. 2. c. 24. False pretences.*

defraud: barely aſking another for a ſum of money was not ſufficient, but ſome pretence muſt be uſed, and that pretence falſe; and the intent was neceſſary to conſtitute the crime. He then mentioned a caſe which was tried before Morton C. J. of Cheſter and himſelf at Cheſter. The defendant applied to Sir T. Broughton, telling him that he was inſtructed by the Duke de Lauzun to take ſome horſes from Ireland to London, and that he had been detained ſo long by contrary winds that his money was ſpent. Sir T. Broughton was thereupon induced to advance ſome money to him. But it afterwards appearing that the whole ſtory was a fiction, the defendant was tried for a cheat on the ſtat. 30 Geo. 2. and convicted.

Rex v. Count Villeneuve, 1778. *Pretending to have been entruſted by one to take his horſes from Ireland to London, and to have been detained by contrary winds, till his money was expended.*

John Witchell was indicted before Lawrence Juſtice on the ſt. 30 Geo. 3. c. 24. for obtaining money from A. and H. Auſtin, by falſe pretences. It appeared in evidence that the Auſtins were clothiers at Wooton-under-Edge; that the priſoner was a ſhearman in their ſervice, and employed to ſuperintend the other ſhearmen, and to take an account of the perſons employed, and of the amount of their wages and earnings; that at the end of each week he was ſupplied with money to pay the different ſhearmen by the clerk of the proſecutors, who advanced to him ſuch ſum as according to a written account or note delivered to him by the priſoner was neceſſary to pay them. The priſoner was not authoriſed to draw from the clerk for money generally *on account*, but merely for the ſums actually earned by the ſhearmen; and the clerk was not authoriſed to pay him any ſums except what he carried in in his account or note as the amount of what was due to the ſhearmen for the work they had done. It appeared that the priſoner on the 9th September 1796 delivered to the proſecutors' clerk a note in writing in this form—"9th September 1796, ſhearmen £.44-11-0", which was the common form in which he made out his account of the amount of their week's wages. And it appeared further by a book in his hand-writing (which it was his buſineſs to keep of the men employed, of the work they had done, and their earnings) that there were in it the names of ſeveral men who had not been employed, who were entered as having earned different ſums of money, and falſe accounts of the work done by thoſe who were employed; ſo as to make

Witchell's caſe, Glouceſter Sp. Aſſ. 1798. MS. Jud. *A workman employed by clothiers was to keep an account of the number of ſhearmen employed and the amount of their earnings and wages, which he was weekly to deliver in in writing to a clerk, who paid him the amount. He delivered in a falſe account, charging for more work and of other men than done, by which he obtained a larger ſum than was due. This is obtaining money by a falſe pretence within the 30 G. 2 c 24.; becauſe without the falſe pretence he would not have obtained the credit; and is not like a caſe of money paid generally on account.*

Ch. XVIII. § 8. *By ſtatute 30 G 2. c. 24. False pretences.*

make out the ſum ſtated in the note to be due to the ſhearmen. The jury found the priſoner guilty; but ſentence was reſpited in order to take the opinion of the Judges whether this caſe were within the ſtat. 30 Geo. 2.; the priſoner's counſel contending that no caſes were within the ſtatute but thoſe where the original credit was obtained by means of the falſe pretence; and that it did not extend to caſes where there was a previous confidence, as he ſaid was the caſe here.

The Judges firſt conferred on the caſe in Eaſter term 1798, when there was ſome diverſity of opinion on the true conſtruction of the ſtatute in this reſpect: but finally they all agreed in Trinity term following, on this principle, *that if the falſe pretence created the credit* the caſe was within the ſtatute: and they conſidered that in this caſe the defendant would not have obtained the credit but for the falſe account which he had deliverèd in, and therefore that he was properly convicted. The defendant, as was obſerved by one of the Judges, was not to have any ſum that he thought fit on account, but only ſo much as was worked out.

Rex v. Airey, M. 42 Geo. 3. 2 Eaſt's Rep. 30. poſt. f. 13. *A carrier obtains the money agreed for by pretending to have delivered the goods, and to have loſt the bailee's receipt.*

In Airey's caſe the indictment charged that one Barrow at K., &c. delivered to the defendant a common carrier certain goods to be carried by him from K. to one Leach at L., there to be delivered, &c. That the defendant received the goods under pretence of carrying and delivering them, and undertook ſo to do; but that intending to cheat Barrow of his money he afterwards unlawfully, &c. pretended to Barrow that he had carried the goods from K. to L. for the purpoſe of delivering them to Leach, and had delivered them to Leach at L., and that Leach had given him, the defendant, a receipt expreſſing ſuch delivery of the goods to him, but that he had loſt or miſlaid the ſame or had left it at home; and that the defendant thereupon demanded of Barrow 16s. for the carriage of the ſaid goods; by means of which falſe pretences he obtained the money, &c. On a writ of error after conviction the judgment was affirmed.

§ 9. *How far the ſtatutes of H. 8 and G. 2. vary from the common law.*

Though the ſtat. 33 H. 8. c. 1. naming *privy tokens* and *counterfeit letters* in other men's names, and the ſtat. 30 Geo. 2. c. 24. including *falſe pretences* in general may ſeem to have embraced every ſpecies of cheat not guarded againſt by the common

Ch. XVIII. §9. *How the ſtats. of* H. 8. *and* G. 2. *vary from common law.*

common law, which without doubt included every cheat effected by means of any falſe token having the ſemblance of public authority, or in any manner touching the public intereſt, or in any other manner by conſpiracy or forgery; yet it is ſtill important to inquire how far theſe ſtatutes vary in any reſpect from the common law or from each other; for both of them are confined to cheats whereby *money* or *goods* are obtained, and therefore they would not in terms embrace *choſes in action*, as bonds, bills, or other written ſecurities for money; though theſe being now made ſubject matters of larceny of the ſame nature and in the ſame degree as if the offender had ſtolen any other goods of like value with the money due thereon, it may be queſtionable whether the fraudulent obtaining (which is included in larceny) of ſuch ſecurities by means even of a privy token or falſe pretence is not alſo indictable by help of the ſtatutes; or at leaſt whether ſuch fraudulent obtaining be not indictable at common law in every inſtance where the obtaining goods of the like value would be ſo indictable. It was alſo ſaid in Pear's caſe that the ſtatutes of Hen. 8. and Geo. 2. were confined to caſes where credit was obtained *in the name of a third perſon*, and did not extend to caſes where a man on his own account got goods *with an intention to ſteal them*. The latter branch of the dictum is undoubtedly true as to both the ſtatutes, in the ſenſe in which it was there applied, in contradiſtinguiſhing caſes of larceny from cheats. The former branch is alſo clearly founded upon the expreſs words of the ſtat. of H. 8., which ſpeaks of "privy tokens and counterfeit letters *in other men's names*." But it cannot fail to be noted that the words of the ſtatute of Geo. 2. are much more general, and have no ſuch reſtrictive words; and indeed it was purpoſely paſſed in order to ſupply the deficiencies of the former ſtatute. Beſides, ſuch an interpretation ſeems ſcarcely conſiſtent with the doctrine in Young's caſe, in Witchell's caſe, and other authorities. In the former Buller J. ſaid that the ingredients of the offence within the ſtatutes were the obtaining by falſe pretences, with intent to defraud; that if the intent were made out and the falſe pretence uſed to effect it, the caſe was brought within the ſtatute.

2 Geo. 2. c. 25. ſ. 3. ante, tit. Larceny and Robbery, 597.

Vide Dean's caſe, ante, 749.

Ante, 689.

Ante, 828. 830.

In Ward's caſe and in Obrian's caſe which will be elſewhere noticed, it was ſaid that the ſtat. 33 H. 8. c. 1. creates no new offences;

Ward's caſe, 2 Ld. Ray. 1466. & Obrian's caſe, 7 Mod. 378.

offence; but only enhanced the punishment of such as were offences at common law. The former part of this was undoubtedly true with respect to the offences then in judgment, which were *forgeries;* for so far the stat. 33 H. 8., which mentions counterfeit letters, was only in confirmation of the common law. And this may serve to explain other general expressions of the same tendency to be met with in several cases which have been already referred to, from whence it might otherwise be collected that every case was supposed to fall within the scope of the common law where a false token was used: but other authorities mentioned seem to restrict the generality of this position, and to confine the operation of the common law in that respect to such cheats in private transactions as are effected by means of false tokens of a public nature, of which false weights and measures, false dice, and false marks known and used in trade are given as examples. Therefore though a false token (other than a forgery) be used to accomplish a cheat, yet it may be doubted whether to make the offence indictable at common law it must not be such a token as is of a public nature, claiming public confidence and thereby calculated to deceive people in general, and not such a *privy* token as is merely adapted to delude a credulous or incautious individual in a private transaction between the parties. If this be received as the true exposition it will account for the passing of the stat. 33 Hen. 8. c. 1. and the particular wording of that law. Nothing appears either by the title or preamble of the statute to shew that it was passed to obviate any doubts in the common law; neither is it so considered by Lord Coke: but rather it purports to provide for offences which had *then lately* sprung up in order to evade the punishment of larceny. The title of the act is "a bill against them that counterfeit letters or *privy* tokens to receive money or goods *in other men's names.*" The use of false *public* tokens for defrauding others was clearly punishable at common law as a cheat. The necessity then of the statute was to reach frauds which were accomplished by means of *privy* tokens. These privy tokens and counterfeit letters must also, as appears from the title, the preamble, and the enacting part, be made *in other men's names.* An argument then arises upon the particular wording of the stat. 33 H. 8. against the supposition that cheating by means of

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Vide Rex v. Wheatley, 2 Burr. 1127. Young and others v. Rex, in Error, 3 Term Rep. 104.

3 Inst. 133.

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every ſpecies of falſe token was puniſhable at common law without the aid of that ſtatute; for then ſo far from there being any neceſſity for it in ſuppreſſion of fraud, which the preamble aſſumes, it was even reſtrictive of the common law: and the reaſon given for it in Ward's and Obrian's caſe, namely, that it went only to enhance the puniſhment, is not well founded; the puniſhments inflicted by the ſtatute being no more than would be warranted by a judgment at common law for a miſdemeanor of ſuch a nature, and it does not even include the power of fining. The ſtat. 30 Geo. 2. c. 24. does indeed enhance the common law puniſhment by enabling the court to tranſport the offenders: but that ſtatute extending the offence to cheating by means of *falſe pretences* is on all hands admitted to be introductive of a new law.

Poſt. f. 14.

§ 10. *Frauds by particular perſons.*

There are various other proviſions by ſtatute for the puniſhment of particular kinds of frauds or cheats; moſt of which have been already referred to under former heads; ſuch as thoſe by goldſmiths, &c. in working up plate (*a*), embezzlements and frauds by *ſervants* (*b*), by *officers of the Bank* (*c*), and of other *public companies* (*d*), by perſons in the *poſt-office* (*e*), by *manufacturers* (*f*), by *lodgers* (*g*), by perſons entruſted with the King's *naval and military ſtores* (*h*), and by thoſe entruſted with *ſhips and goods at ſea* (*i*).

Ante. (*a*) 194. (*b*) 560. (*c*) 578. (*d*) 579. (*e*) ib. & 604. (*f*) 584. (*g*) 585. (*h*) 621. & 755. (*i*) 800. and *vide* poſt. *Malicious Miſchief.*

Bankrupts.

Frauds committed by *bankrupts* will be conſidered hereafter, together with other offences againſt public trade with which they are mingled.

Vide tit. Nuſance.

Others it is ſufficient here barely to refer to; as the ſtat. 6 Geo. 1. c. 18. againſt entering into public ſubſcriptions for certain ſchemes of commerce, &c. which is made indictable as a nuſance; and the ſtat. 37 Geo. 3. c. 143. which gives a ſummary juriſdiction to juſtices of the peace in petty ſeſſions to puniſh retailers in whoſe poſſeſſion falſe weights and balances ſhall be found.

Falſe weights and Balances.

§ 11. *Fraudulent conveyances &c. by* 13 Eliz. c. 5.

The ſtat. 13 Eliz. c. 5. againſt fraudulent deeds, alienations, &c. reciting "that feoffments, gifts, grants, alienations, conveyances, bonds, ſuits, judgments, and executions, are contrived of malice, fraud, covin, colluſion, or guile, to the end, purpoſe, and intent, to delay hinder or defraud creditors and others of their juſt and lawful actions,

Ch XVIII. § 11. *By ſtat.* 27 Eliz. c. 4. *fraudulent conveyances, &c.*

" tions, ſuits, debts, account, damages, penalties, forfeitures, " heriots, mortuaries, and reliefs," &c.: It therefore (ſ. 1.) declares and enacts " that all and every feoffment, gift, " grant, alienation, bargain and conveyance of lands tene- " ments, hereditaments, goods and chattels, or of any of " them, or of any leaſe, rent, common, or other profit or " charge out of the ſame lands, &c. by writing or other- " wiſe, and all and every bond, ſuit, judgment, and execu- " tion, to or for any intent or purpoſe before declared and " expreſſed, ſhall be deemed (as againſt the party grieved) " utterly void," &c. And then it enacts (by ſ. 3.), " That " all and every the parties to ſuch feigned, covinous, or " fraudulent feoffment, gift, grant, alienation, bargain, con- " veyance, bonds, ſuits, judgments, executions, and other " things before expreſſed, (viz. for the purpoſe of delaying " hindering or defrauding creditors and others) and being " privy and knowing of the ſame, who ſhall wittingly and " willingly put in ure, avow, maintain, juſtify or defend the " ſame, as true ſimple and done had or made bonâ fide and " upon good conſideration; or ſhall alien or aſſign any the " lands, tenements, goods, leaſes, or other things before " mentioned to him or them conveyed as aforeſaid, or any " part thereof, ſhall incur the penalty and forfeiture of one " year's value of the ſaid lands, &c. of or out of the ſame, " and the whole value of the ſaid goods and chattels, and " alſo ſo much money as are or ſhall be contained in any " ſuch covinous and feigned bond; one moiety to the " crown, the other to the party grieved, to be recovered in " any of the Queen's courts of record by action, &c.; and " alſo being thereof lawfully convicted ſhall ſuffer impriſon- " ment for one half year without bail or mainpriſe."

27 Eliz. c. 4. *Fraudulent conveyances, &c. to defeat or prejudice purchaſers.*

Then by ſtat. 27 Eliz. c. 4. (*a*) reciting that ſubjects and corporations " after conveyances and purchaſes of lands, " tenements, leaſes, eſtates, and hereditaments for money or " other good conſideration may incur loſs and prejudice by " reaſon of fraudulent and covinous conveyances, eſtates,

(*a*) Copyholds were holden not to be within this act by Blencowe J. at Launceſton 1699. Bull N. P. 108. But in Doe d. Watſon v. Routledge, B. R. M. 18 G. 3. Lord Mansfield C. J. ſaid that dictum was of no authority, and ought to be rejected. And Aſton J. remembered a caſe to the contrary: though the Court reſerved giving any deciſive opinion. Dougl. 716. n.

Ch. XVIII. § 11. *By ſtat.* 27 Eliz. c. 4 *fraudulent conveyances, &c.*

" gifts, grants, charges, and limitations of uſes, made or to
" be made in or out of lands tenements or hereditaments ſo
" purchaſed, which ſaid conveyances, &c. were or ſhall be
" meant by the parties to be fraudulent and covinous, of
" purpoſe to deceive ſuch as have or ſhall purchaſe the
" ſame; or elſe by the ſecret intent of the parties the ſame
" be to their own proper uſe, and at their free diſpoſition,
" coloured nevertheleſs by a feigned countenance and ſhew
" of words and ſentences as though the ſame were made
" bonâ fide, &c. for remedy, (ſ. 2.) And for avoiding ſuch
" fraudulent conveyances, &c." it enacts " that every con-
" veyance, grant, charge, leaſe, eſtate, incumbrance, and
" limitation of uſe or uſes, of in or out of any lands tene-
" ments or other hereditaments whatſoever made heretofore,
" &c. or at any time to be made for the intent and of pur-
" poſe to defraud and deceive ſuch perſon or perſons, bodies
" politic or corporate as have purchaſed or ſhall afterwards
" purchaſe in fee ſimple, fee tail, for life lives or years, the
" ſame lands, &c. or any part or parcel thereof, ſo formerly
" conveyed, granted, leaſed, charged, incumbered, or li-
" mited in uſe, or to defraud and deceive ſuch as have or
" ſhall purchaſe any rent, profit, or commodity, in or out of
" the ſame or any part thereof, ſhall (againſt the parties or
" thoſe claiming under them) be utterly void," &c. And by
Sect. 3. " All and every the parties to ſuch feigned, co-
" vinous and fraudulent gifts, grants, leaſes, charges, or
" conveyances before expreſſed, or being privy or knowing
" of the ſame or any of them, who ſhall wittingly and wil-
" lingly put in ure, avow, maintain, juſtify, or defend the
" ſame or any of them, as true ſimple and done, had or
" made, bonâ fide, or upon good conſideration, to the diſ-
" turbance or hindrance of the ſaid purchaſer or purchaſers,
" leſſees, or grantees, or of their heirs, ſucceſſors, executors,
" adminiſtrators or aſſigns, or ſuch as ſhall lawfully claim
" any thing by from or under them or any of them, ſhall
" incur the penalty and forfeiture of one year's value of the
" ſaid lands tenements and hereditaments ſo purchaſed or
" charged, (one moiety to the Crown, the other to the party
" grieved, to be recovered by action, &c.); and alſo being
" thereof lawfully convicted ſhall ſuffer impriſonment for
" one half year, without bail or mainprize."

By

Ch XVIII. § 12. *By ſtat.* 9 Ann. c. 14. *cheating with dice, &c.*

By ſtat. 9 Ann. c. 14. ſ. 5. "If any perſon or perſons "ſhall by any fraud or ſhift, couſenage, circumvention, "deceit, or unlawful device, or ill practice whatſoever, in "playing at or with cards, dice, or any the games afore-"ſaid (*a*), or in or by bearing a ſhare or part in the ſtakes, "wagers, or adventures; or in or by betting on the ſides or "hands of ſuch as do or ſhall play as aforeſaid, win, obtain, "or acquire to him or themſelves, or to any other or others, "any money or other valuable thing or things whatſoever, "or ſhall at any one time or ſitting win of any one or more "perſon or perſons whatſoever above the ſum or value of "10l.; and being convicted of any of the ſaid offences upon "an indictment or information to be exhibited againſt him "or them for that purpoſe, ſhall forfeit five times the value "of the money or other thing ſo won as aforeſaid, and in "caſe of ſuch ill practice as aforeſaid ſhall be deemed infa-"mous, and ſuffer ſuch corporal puniſhment as in caſes of "wilful perjury; and ſuch penalty to be recovered by ſuch "perſon or perſons as ſhall ſue for the ſame by ſuch action "as aforeſaid (*b*)."

§ 12. *Cheating with dice, &c.* 9 Ann. c. 14. and *vide* other proviſions in this act and 16 Car. 2. c. 7. giving actions to the party grieved to recover penalties.

In Lookup's caſe the Court held that they had no authority on ſuch conviction to ſet a fine upon the offender; but on judgment given that he is convicted, &c. the penalty ſhall be recovered thereon by the informer.

Lookup's caſe, 2 Stra. 1048. 7 Term Rep. 461.

Form of Indictment.

As to the form of the indictment, where the charge is for cheating by falſe tokens, it is neceſſary both at common law and upon the ſtat. 33 H. 8. to ſet forth what the falſe tokens are; in like manner as it is neceſſary to deſcribe the falſe pretences in an indictment founded on the ſtat. 30 Geo. 2. And in neither caſe is it enough to allege generally that the cheat was effected by means of certain falſe tokens or falſe pretences. The reaſon of which was given by Groſe J. in delivering the opinion of the Judges in Fuller's caſe, that there may be ſome falſe pretences not within the ſtatute, and therefore they muſt be ſet out, that the Court may ſee what they were. But it does not appear neceſſary to deſcribe

§ 13. *Form of indictment.* Rex v. Munos, 7 Mod. 316. 2 Stra. 1127. and Eddy's caſe, H. 10 Ann. MS. Tracy, 142. Rex v. Maſon, 2 Term R. 581.

Fuller's caſe, MS Jud. ante, 92. and poſt. Indictment, General Form. Rex v. Young and others, ante, 828.

(*a*) The games before mentioned are "Cards, Dice, Tables, Tennis, Bowls, "or other game or games whatſoever."

(*b*) The *qui tam* actions are before mentioned.

Ch. XVIII. § 13. *Form of Indictment.*

them more particularly than they were ſhewn or deſcribed to the party at the time, and in conſequence of which he was impoſed upon. Alſo, it does not ſeem neceſſary to make any expreſs allegation that the facts ſet forth ſhew a *falſe token* or a *falſe pretence;* for in Terry's caſe, where the indictment on the ſtat. 33 H. 8. charged that he by a *falſe note* in the name of J. D. obtained into his hands a wedge of ſilver, &c.; it was holden well enough, though it were not ſaid to be a *falſe token.*

Terry's caſe, Cro. Car. 564.

Rex v. Airey, M. 42 G. 3. 2 Eaſt's Rep. 30. *Vide* ante, 831.

In Airey's caſe before mentioned the indictment which was framed on the ſtat. 30 G. 2. after alleging that the defendant unlawfully knowingly and deſignedly pretended ſo and ſo, proceeded thus—" by means of which ſaid *falſe* pretences the defendant unlawfully, &c. obtained from J. B. 16s. with intent to cheat the ſaid J. B. of the ſame," &c.; and then proceeded to negative the truth of the pretences uſed. This was holden to be ſufficient without alleging in expreſs terms that the pretences were falſe; or rather it was conſidered that the whole indictment taken together did amount to an expreſs allegation that the pretences were falſe; and that there was no technical form or order of words required ſo to expreſs the offence, if upon the whole it appeared that the money had been obtained by means of the pretence ſet forth, and that ſuch pretence was falſe.

Rex v. Young, and others, 3 Term Rep. 98. Ante.

Several may be charged jointly in an indictment with the ſame cheat; as if they be preſent and concurring at the time with thoſe by whom the falſe tokens or pretences are ſhewn by act or ſpeech.

§ 14. *Puniſhment.*

At common law the puniſhment for a cheat is as in other caſes of miſdemeanor by fine, impriſonment, or further by infamous corporal pain in aggravated caſes. How this has been confirmed or extended by the two ſtats. of H. 8. and Geo. 2. has been already ſhewn. Lord Coke ſays that offenders can only ſuffer corporal puniſhment, but cannot be fined by force of the ſtat. 33 H. 8. alone; though Hawkins refers to a precedent in Croke's Rep. where an offender was fined for a cheat falling within that ſtatute, on which the indictment was laid. Caſes however may occur where the offender may be fined at common law as well as corporally puniſhed under that ſtatute, which certainly was not meant

3 Inſt. 133. 1 Hawk. ch 71. ſ. 6.

Terry's caſe, Cro. Car. 564.

to

to abridge but rather to extend the common law. And such upon examination might well have been done there; for the falſe token there laid was a *falſe note* in the *name of another perſon;* which was a direct forgery at common law. So now there can be no offence either at common law or by the ſtatute of H. 8. which is not alſo comprehended within the act of the 30 Geo. 2. (ſubject to the obſervation before made), though the reverſe does not hold good. (Ante, 832.)

Where goods have been obtained from another by mere fraud, the Court have no power of awarding reſtitution on conviction of the offender, as in caſes of felony.

Vide ante, 789. Parke v. Patrick, 5 Term Rep. 175. and R. v. De Veaux and others, 2 Leach, 666.

CHAP. XIX.

FORGERY.

Definition. - - - - § 1.
The falſe making or Alteration of any written Inſtrument whereby another may be prejudiced, with Intent to deceive and defraud.
Puniſhable as Miſdemeanor at Common Law. ib.

General Diviſion. - - - § 2.

I. *With what Intent the Act muſt be done.* § 3.
With Intent to deceive and defraud, though none be actually defrauded. *ib.*
But Q. Alteration not fraudulent may avoid a Security. *ib.*

II. *What falſe making or Alteration amounts to Forgery.* - - - - § 4.
The Act alone before Publication. *ib.*
Publication with Knowledge made a ſubſtantive Offence by Statute in certain Caſes. *ib.*
Forging Deed in the Party's own Name. *ib.*
Indorſing Bill of Exchange payable to another of the ſame Name. *ib.* Or putting off a Note made in Truth in the Party's Name as the Note of another. *ib.*
Making fraudulent Inſertion, Alteration, or Eraſure, in material Part of a true Inſtrument; though executed afterwards by the true Party, not knowing thereof. *ib.*
But not a mere Omiſſion to inſert a Clauſe in it before Execution; unleſs ſuch Omiſſion alter the Senſe of what is inſerted. *ib.*
Nor a fraudulent perſonating of the true Man: but Indictment lies for the Conſpiracy and Cheat. § 5.
Reſemblance of falſe to true Inſtrument need not be perfect. - - - - § 6.

III. *Of*

III. *Of what Inſtruments, &c. Forgery may be committed.* - - - - § 7.

1. *At Common Law.*

Of Records, and other public Inſtruments; of private Deeds, &c. under Seal, Wills, and other Inſtruments or Writings, ſuch as an Acquittance for Goods, or Order to appropriate them to the Party's Uſe, whereby any Perſon may be injured or defrauded. *ib.*

Q. As to a pretended Order or Authority to a Gaoler to releaſe a Priſoner, which if genuine was a Nullity. *ib.*

2. *By Statute;* relating - - - - § 8.

1. *To Records*, avoiding, raſing, or altering ſuch, Felony by Stat. 8 H. 6. c. 12. and 8 Ric. 2. c. 4. § 9. *a*

2. *To the Transfer of public Funds, and the Stocks of public Companies.* - - - - § 9. *b*

The Forgery of any *Order, Aſſignment, Receipt, Diſcharge, Letter of Attorney*, or *other Authority or Inſtrument to transfer, &c.* any Share or Annuity of any capital Stock eſtabliſhed or to be eſtabliſhed by Parliament, or of any public Company; or to receive any ſuch Annuity or Dividend; or forging the *Name of any Proprietor*, &c. to ſuch Letter of Attorney, &c.; or *knowingly demanding* or *endeavouring* to have ſuch Share transferred, &c.; or ſuch Dividend received, &c.; or procuring or aſſiſting, &c. therein; Felony without Clergy, by Stat. 9 G. 1. c. 22. 31 Geo. 2. c. 22. ſ. 77. and 4 Geo. 3. c. 25. ſ. 15. *ib.*

Extended by 33 Geo. 3. c. 30. to Transfers of Stocks in the Names of any other than the Owners. *ib.*

Forging or aſſiſting to forge, or uttering, &c. forged *Transfers*. *ib.*

Alſo to Perſons making or aſſiſting to make *falſe Entries* in the Books of the Bank. *ib.*

Making out *falſe Dividend Warrants*, Tranſportation for 7 Years. *ib.*

Forging *Names of Witneſſes to Inſtruments* for Tranſfer or Receipt of Public Stock, or Stock of the Bank,

(*Of what.*)

South-Sea, or East-India Companies, Felony by Stat. 37 Geo. 3. c. 122. - - - § 9. *b*

Extended to certain Irish Funds made payable at the Bank of England by Stats. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46.

One may be indicted for forging a Transfer of Stock of which A. was charged to be possessed of and entitled to; though he had not accepted such Transfer as directed by Statute. *ib.*

3. *Notes and other Securities of the Bank of England and other public Companies.* - - § 10.

i. *Securities of the Bank of England;* Forgery thereof, or demanding Money thereon, made Felony without Clergy by Stat. 15 Geo. 2. c. 13. - § 10.

So of *Common Seal* by several Stats. of Will. 3.

Having in Possession (except by Persons authorised) of *Instruments, &c. for making Paper* (like that used by the Bank of England in their Notes in the Respects therein mentioned); or assisting, &c. Felony without Clergy, by Stat. 13 Geo. 3. c. 79. *ib.*

Making Plates, &c. with Words (*Bank of England*, &c. or *the Sums*) in *white Letters on black Ground;* or using such Plates; or knowingly having such in Custody; or wilfully uttering such Notes, &c. Imprisonment. *ib.*

Making or *having in Possession* certain *Paper* like the Bank *with curved Lines*, &c. Felony and Transportation for 14 Years by Stat. 41 Geo. 3. c. 39. *ib.*

Knowingly receiving or *having in Possession* forged Bank Notes, &c. without lawful Excuse, Felony and Transportation for 14 Years. *ib.*

Engraving Plate, &c. like Bank Note, or *using*, or *knowingly having such in Possession*, without written Authority, or *uttering*, &c. Felony and Transportation for 7 Years. *ib.*

What a *rasing* of an *Indorsement* on a Bank Bill. § 11.

What a sufficient Resemblance to a Bank Note, &c. to be said to *purport* to be such. *ib.*

ii. *Securities of South-Sea Company.* - § 12.

Forgery

(*Of what.*)

Forgery of *Common Seal, Bonds*, &c.; *offering to diſpoſe of* or *put away* the ſame knowingly, &c.; *demanding Money thereon*, &c. with Intent to defraud the Company or any other; Felony without Clergy by Stat. 9 Ann. c. 21. and 6 Geo. 1. c. 4. § 12.

So forging *Indorſement* or *Aſſignment* of ſuch Bond, &c. by Stat. 12 Geo. 1. c. 32. *ib.*

So forging *Receipts* for Stock and Dividend Warrants, or uttering the ſame, &c. by Stat. 6 Geo. 1. c. 11. *ib.*

iii. *London and Royal Exchange Aſſurance Company*, and *Globe Inſurance Company*, protected by ſimilar Proviſions, extending alſo to *Policies* and *Bills*. § 13.

iv. *Eaſt-India Company*. - - - § 14.

Forging *Bond, Indorſement*, or *Aſſignment*; or uttering or publiſhing ſuch; Felony without Clergy by Stat. 12 Geo. 1. c. 32. ſ. 9. *ib.*

v. *Plate Glaſs Manufactory Company*. - § 15.

Forging *Seal*, or *Deed or Writing under Seal*; or *demanding Money* in purſuance thereof; Felony by Stats. 13 Geo. 3. c. 28. and 33 Geo. 3. (c. 17.) ſ. 23.

4. *Stamps*. - - - - § 16.

Forgery thereof on written *Inſtruments* on which *public Duties are levyable* made capital Felonies by the reſpective Revenue Acts. *ib.*

Fraudulently *uſing Stamps a ſecond Time* by tranſpoſing them or eraſing, &c., Words in the ſtamped Inſtrument; Felony and Tranſportation by Stat. 12 Geo. 3. c. 48. Q. Made capital in ſome Caſes by ſubſequent Statutes. - - § 17.

So forging *Aſſay Marks* or *Duty Stamps* on *Gold* or *Silver Plate* by Stats. 31 Geo. 2. c. 32. ſ. 15. and 24 Geo. 3. ſt. 2. c. 53. ſ. 16. - - § 18.

But forging other Marks required by Stat. 38 Geo. 3. c. 69. only Felony and Tranſportation for 7 Years. *ib.*

Conſtruction on the Stamp Acts. - - § 19.

Indictment for uttering Pieces of *Paper liable to the Receipt Duty*, held well. *ib.*

" Duties

" Duties of Excise" and " Duties under the Management of the Commissioners of Excise," are tantamount Expressions under Stat. 27 Geo. 3. c. 13. s. 35. 38. and the Penalty of forging Stamps in respect of Duties of the latter Sort revived under the former Denomination. - - - § 19.

Indictment charging the Duty to be laid " for, on and " in respect of," is good; though the Words of the Act be " for and upon." *ib.*

5. *Official Papers, Securities, and Documents.* - § 20.

i. Forging *Testimonials of Soldiers and Mariners* a capital Felony by Stat. 39 Eliz. c. 17. s. 3. *ib.*

ii. Forging, &c. *Memorials of Registry of Deeds and Wills*, and *of Bargains and Sales* in Yorkshire and Middlesex, capital Felonies by several Statutes. § 21.

iii. Forging *Documents* relating to *Suitors in Chancery*, capital Felony by Stat. 12 Geo. 1. c. 32. s. 9. § 22.

iv. Forging *Mediterranean Passes*, capital Felony by Stat. 4 Geo. 2. c. 18. - - § 23.

v. Forging *Marriage Registers and Licences*, capital Felonies by Stat. 26 Geo. 2. c. 33. s. 16. § 24.

vi. Forging *Seamen's Letters of Attorney*, &c. to receive Wages, Prize Money, &c. *Last Wills*, or *other Powers or Authority whatsoever* for such Purpose; or *uttering* or *publishing* the same: or forging *Certificate of Discharge*, &c.

Or *Certificate* to obtain *Letters of Administration* to *Seamen*, and *other Documents to receive Wages*, &c. Felony without Clergy by various Statutes. § 25.

Muster-Books of the Navy Office Evidence. *ib.*

vii. Forging *Presses*, Felony without Clergy by Stat. 32 Geo. 2. c. 14. s. 9. - - § 26.

viii. Forging *Franks of Letters*, Felony and Transportation by Stat. 24 Geo. 3. st. 2. c. 37. s. 9. § 27.

ix. Forging, &c. of *Exchequer Bills, Orders, Assignments*, &c. capital Felonies by the several Acts. § 28.

x. So of *Lottery Tickets.* - - § 29.

xi. Re-

xi. *Receipts* for *Duties on Legacies*, altering thereof, a Penalty of 500l. Forging *Stamps* thereof capital Felony by Stat. 36 Geo. 3. c. 52. - § 30.

xii. Making or ſubſcribing *falſe Certificates of Naval or Military Stores*, a Miſdemeanor. - § 31.

6. *Private Papers, Securities, and Documents.* § 32.

i. Forging *Deeds, Charters, Writing ſealed, Court Roll, or Will*, to móleſt, defeat, charge, &c. the Eſtate of Freehold or Inheritance of any Perſon; or knowingly publiſhing or ſhewing in Evidence any ſuch (except by Attornies, &c. for Clients); Miſdemeanor, and ſubjected to infamous Puniſhment by Stat. 5 Eliz. c. 14. *ib.*

Forging the like Deeds, &c. with Intent for any to claim Eſtate for Term of Years, &c. Or

Forging any *Obligation, Acquittance, Releaſe, or Diſcharge* of any Debt, &c. or other Thing perſonal; or knowingly pronouncing or publiſhing, &c. the ſame, Miſdemeanor, &c. *ib.*

Committing any of ſuch Offences a ſecond Time, (i. e. after Conviction by Judgment) Felony without Clergy. *ib.*

Conſtruction of the Stat. 5 Eliz. c. 14. - § 33.

To what Eſtates the Stat. extends. *ib.*

To what Writings. *ib.*

ii. Forging any *Deed, Will, Teſtament, Bond, Writing-Obligatory, Bill of Exchange, Promiſſory Note for the Payment of Money, Indorſement or Aſſignment of ſuch Bill or Note, Acquittance or Receipt for Money or Goods*, with Intent to defraud any Perſon (or by Stat. 31 Geo. 2. c. 22. ſ. 78. any Corporation); or *uttering or publiſhing* the ſame as true; Felony without Clergy, by Stat. 2 Geo. 2. c. 25. and 9 Geo. 2. c. 18. - - - - § 34.

Extended by Stat. 7 Geo. 2. c. 22. and 18 Geo. 3. c. 18. to *Forgers, Procurers*, or *Aſſiſters* in forging of any *Acceptance of any Bill of Exchange*, or *the Number or principal Sum of any accountable Receipt for any Note, Bill, or other Security for Payment of Money*, or any

Warrant

(*Of what.*)

Warrant or Order for Payment of Money or Delivery of Goods. - - - - - § 34.

Knowingly *uttering or publiſhing* the ſame. *ib.*

Quære. Whether uttering in England a Bank Note made and payable in Scotland be within the Acts as a *Writing-Obligatory.* - - § 35.

What a *Receipt for Money.* - - § 36.

Indictment for forging a Receipt, viz. " Received the " *Contents above* by me," &c. is ſufficient, without ſetting forth the Bill of Items to which it refers. *ib.*

Receipt for *Bank Notes* not a Receipt for *Money* or *Goods* within Stat. 2 Geo. 2. c. 25. *ib.*

Nor a forged Receipt for *Bank Notes* with Intent to defraud a *Corporation*, within the Stat. 7 Geo. 2. which only names *Perſons.* *ib.*

But that now aided by Stat. 18 Geo. 3. c. 18. *ib.*

A falſe Entry of a Sum and a Date as by the Bank on the Debtor Side of their Caſh Book kept by a Cuſtomer, is a Receipt for Money, &c. within the Acts. *ib.*

But where the Words forged do not in themſelves purport to be a Receipt (as a mere Name), but are only ſo as connected with ſome other Matter, ſuch Connection muſt be ſhewn in the Indictment. *ib.*

A Scrip Receipt with the Blank not filled up with any Perſon's Name, from whom it was ſuppoſed to be received, is not a Receipt for Money within the Statutes. *ib.*

A falſe Voucher forged in the Name of a third Perſon, as acknowledging the Receipt of Money by ſuch Perſon to the Forger in order to obtain Reimburſement from another on the Credit of ſuch Voucher, is within the Statutes. *ib.*

What a *Warrant or Order for Payment of Money, or Delivery of Goods.* - - - § 37.

It muſt be by one having or claiming Authority to command, and not merely a Requeſt. *ib.*

But ſufficient if it ſo purport to be, though in Truth he had no ſuch Authority. - - § 38.

And though made in a fictitious Name. *ib.*

An Order in general Terms is sufficient, without specifying the particular Goods or Sum of Money; if intelligible to those to whom addressed. - § 39.
As "to deliver my Work," &c. *ib.*
So an Order for Payment of "all my Proportion of Prize Money," &c. *ib.*
The Statutes extend to Instruments of other specific Denominations, if in legal Effect *Warrants*, *Orders*, &c. as Bills of Exchange, &c. - - § 40.
Not confined to Commercial Transactions. § 41.
Extends to Orders for Seamen's Pay, &c. *ib.*
By Stat. 41 Geo. 3. c. 57. counterfeiting, &c. certain *Moulds* for certain *printed Forms* or *Paper* of a particular Description *used by Bankers*, &c. in their *Bills*, *Notes*, &c. or using the same, &c. or publishing such Notes, &c. knowingly; Misdemeanors: and for 2d Offence, Transportation. - § 42.

IV. *How far the Validity in Law of the Thing forged, supposing it were true, is essential to Forgery.* - - - - § 43.

Sufficient if it purport on the Face of it to be such a true Instrument or Writing, of which Forgery may be committed.
As the Forgery of a Protection in the Name of one as a Member of Parliament who was not so. *ib.*
Of a Conveyance of an Estate by a wrong Description. *ib.*
Of the Will of a living Person. *ib.*
Of the Instruments of Persons who had no Existence. *ib.*
What Degree of Similitude between the counterfeit and true Instrument is sufficient. - - § 44.
It must have the essential Requisites of the true Instrument; but sufficient if calculated to impose on Persons in general. *ib.*
How the Counterfeit must tally with the Description of the particular Instrument alleged in the Indictment to be forged. - - - § 45.
A Bill of Exchange directed to J. *King* and accepted by J. *King* cannot be laid as *purporting* to be directed to J. *King* by the Name of J. *Ring*. *ib.*

But Indictment for forging Will of P. P. good, though the Will which began "I P. P." &c. concluded with the Signature of *J. P.* - - § 45.

But if the Inſtrument, if genuine, would be illegal and void on the Face of it, as where a forged Will of Lands was only atteſted by two Witneſſes, being preſumed to be freehold, (the contrary not appearing), and therefore void by Stat. of Frauds, held no Forgery as of a Will. *ib.*

So where a Bill of Exchange for leſs than 5l. had not the Requiſites enjoined by Stat. 17 Geo. 3. c. 30. without which it was declared void. *ib.*

Aliter in caſe of Forgery of a Bill of Exchange on unſtamped Paper. *ib.*

Or where the Inſtrument is only avoidable by collateral Evidence dehors, but good on the Face of it. *ib.*

V. *How far uſing a fictitious Name, or perſonating the true Man or fictitious Character aſſumed at the Time, will affect the Offence.* § 46.

Forgery may be committed in the Name of a non-exiſting Perſon. *ib.*

As of a Power of Attorney to receive Prize-Money in the Name of a ſuppoſed Repreſentative of a deceaſed Seaman. *ib.*

So of bills of Exchange drawn or indorſed in fictitious Names. *ib.*

Immaterial whether any additional Credit be gained by the Forgery; as where a Party unknown indorſed a Bill in a different Name as for his own. § 47.

Or where one in like Manner ſigned a Receipt to the Drawee for the Contents of a Bill, made payable to Order, and indorſed in Blank. *ib.*

But where the Credit is given to one *perſonally*, ſaid to be no Forgery if he give a Security for it in a fictitious Name as for his own: (ſed Qu. if done fraudulently? poſt.). Aliter, where he thereby gains a ſuperior Credit, or induces a Truſt which would not otherwiſe be beſtowed. - - - § 48.

Or

Or as it ſeems, if he uſed ſuch other Name the better to deceive and defraud, and elude Reſponſibility. § 48.

Giving Security in Name of another real Perſon, whom the Party aſſumes to be, is Forgery. - § 49.

Although the Party's own Name happened to be the ſame. As where one indorſed a bill payable to the Order of another of the ſame Name, knowing that he was not the Perſon intended. *ib.*

Or where one, having authoriſed another to draw a Note in his own Name, afterwards paſſed it off as another's. *ib.*

Aliter where one only aſſumed to be the real Indorſer, though for the Purpoſe of Fraud. *ib.*

But perſonating others for fraudulent Purpoſes puniſhable capitally by Statute in certain Caſes. *Poſt.*

Aſſuming to be the ſuppoſed Character in whoſe Name the Forgery is committed. - - § 50.

Giving a Banker's Draft in a fictitious Name as for the Party's own, but with a falſe Deſcription of Place of Abode to elude Reſponſibility, Forgery. *ib.*

Q. Where the Party, at the Time he gave the Note gave his true Place of Abode, and had taken the Houſe in the aſſumed Name a Month before; though he aſſumed it for the Purpoſe of Fraud. *ib.*

VI. *What a publiſhing or uttering.* - § 51.

Every Manner of exhibiting the Inſtrument as a true one, with Knowledge of its being forged.

This Offence diſtinct from the Act of Forgery.

VII. *Aſſiſters and Acceſſaries.* - § 52.

At Common Law all are Principals in Forgery.

Aliter under the Statutes creating it Felony.

VIII. *Indictment and Evidence.* - § 53.

Indictment muſt ſet forth forged Inſtrument in *Words* and *Figures. ib.*

But ſetting it forth "as follows" is the ſame as "according to the *Tenor* following." *ib.*

Indictment, ſetting forth the *Tenor* of the Note forged, ſuſtained by Proof that the Atteſtation of the Witneſs, and the Words "M. W. her Mark" ſet forth, were added after the Party had ſigned the Note, but on the ſame Occaſion. - - § 53.

And ſufficient to ſet forth the Thing forged, as a Receipt, which purports to be ſuch on the Face of it, without ſetting forth the Inſtrument to which it has Relation or Reference. *ib.*

Aliter where in itſelf it did not purport to be a Receipt; in which Caſe it muſt be ſhewn how it operated as ſuch by proper Averments. *ib.*

A literal Variance, as writing "Value *rteeived*" for "Value *receivd*," evidently meaning the ſame word, will not vitiate. - - - - § 54.

Where *true* Inſtrument *in Part altered*, it may be laid as a Forgery of the *Whole*. - - § 55.

Charging Forgery of a *Paper Writing purporting* to be ſuch an Inſtrument as the Statute deſcribed is good. § 56.

But the forged Paper muſt *on the Face of it* purport to be as deſcribed. *ib.*

Deſcribing a Bill as *purporting* to be directed to J. K. by the Name of J. R., or to R. D. &c. by the Name of Meſſrs. D. &c. bad. *ib.*

Stating a Bill of Exchange *to be ſigned* by H. H., inſtead of only *purporting* to be ſo ſigned, is bad, if the Signature appear to be forged. *ib.*

What *technical Words* neceſſary in laying Forgery at Common Law. - - - § 57.

Indictment muſt bring Offence within the deſcriptive Words of the Statute. - - § 58.

But *ſuperfluous Deſcription* does not hurt; as deſcribing a Bond to be a Bond *and* Writing-Obligatory. *ib.*

And charging that one *altered* a Bill of Exchange *by falſely making, forging* and adding a cypher, &c. is good, though the Statute has the Words "if any Perſon ſhall *falſely make, forge*, &c. *ib.*

So a *Variance* in immaterial Words of a Statute does not hurt; as ſtating a Duty to be chargeable *for*, *on*,

on, and in reſpect of Muſlin; the Statute impoſing it *for and upon*, &c. - - § 58.

But alleging that Defendant forged *or* cauſed to be forged, &c. bad for Uncertainty. *ib.*

Indictment muſt ſtate *Intent to defraud*, and *whom*. § 59.

Offence created, with Intent to defraud *a Perſon*, not ſuſtained by Charge or Intent proved to defraud a *Corporation*: But this now remedied by Statute 18 G. 3. c. 18. in certain Caſes. *ib.*

Indictment need not ſtate how the Party charged was to be defrauded, which is Matter of Evidence. *ib.*

But ſufficient to allege the Forgery of the Thing prohibited, and that it was with Intent to defraud ſuch an one.

How the *Parties* to be deſcribed againſt whom the Offence is committed; particularly in Caſe of Partnerſhip Firms, and public Bodies. - § 60.

What Proof required of Forgery in the particular *County*. - - - - § 61.

IX. *As to the Competency of the Witneſſes to the requiſite Facts.* - - - § 62.

Perſons *intereſted* in avoiding an Inſtrument not competent to prove the Writing forged. - § 63.

Though by collateral Evidence diſproving the Hand-Writing. - - - - § 64.

How far competent to prove other collateral Facts. § 65.

As Identity, or Non-Exiſtence of the Perſon whoſe Name is alleged to be forged. *ib.*

Where the Intereſt of the Party is removed by Payment of the Security, or Settlement of the Account outſtanding againſt him on Account of the Forgery, his Competency to prove his Hand-Writing forged is reſtored. - - - - § 66.

So the Party is competent who never had an Intereſt: as in caſe of Forgery of a Will of a living Perſon, or of Vouchers in his Name for the Purpoſe of impoſing on third Perſons with whom he had no Concern. § 67.

How far one who is a bare *Truſtee*, acting in the Name or for the Benefit of another is a competent or neceſſary Witneſs to prove the Forgery of his Hand-Writing. - - - - § 68.
In all Caſes a *Releaſe* reſtores the Competency of a Witneſs otherwiſe intereſted. - § 69.

X. *Judgment and its Conſequences.* - § 70.

Forgery.

§ 1. *Definition.* *Vide* 3 Inſt. 169.

TO *forge*, (a metaphorical expreſſion borrowed from the occupation of the ſmith), means, properly ſpeaking, no more than to *make* or *form*: but in our law it is always taken in an evil ſenſe; and therefore *Forgery* at common law denotes a *falſe* (*a*) making [which includes every alteration of or addition to a true inſtrument], a making *malo animo*, of any written inſtrument for the purpoſe of fraud and deceit. This definition reſults from all the authorities ancient and modern taken together. The more early writers on the Crown Law ſeem to have fettered their definitions of the nature and principle of the offence with its application to the particular ſpecies of inſtruments alone to which the experience and neceſſity of their own times had extended it: theſe, which I ſhall preſently advert to, were either public inſtruments or deeds. But they all conſider the offence as conſiſting in the falſe and fraudulent making or altering of ſuch and ſuch inſtruments. Lord Coke indeed ſeems to confine it in ſtrictneſs to an act done *in the name of another*, but this was long ago agreed in Anne Lewis's caſe to be too narrow a definition. Hawkins ſays, that the notion of forgery does not ſeem ſo much to conſiſt in the counterfeiting a man's hand and ſeal, as in endeavouring to give an appearance of truth to a mere deceit and falſity, and either to impoſe that upon the world as the ſolemn act of another, which he is no way privy to, or at leaſt to make a man's own act appear to have been done at a time when it was not done, and by force of ſuch a falſity to give it an operation

Brit. 16. Fleta, lib. 1. c. 22 and lib. 2. c. 1. ſ. 9. *Vide* Pult. 43. b. &c. 3 Inſt. 169. 1 Hawk. ch. 70. ſ. 1. &c. Poſt. ſ. 7.

Lewis's caſe, Poſt. 117. Poſt. ſ 46. 1 Hawk. ch. 70. ſ. 2.

(*a*) Forgery is known in the civil law under the denomination of *crimen falſi*.

which

Ch. XIX. § 1. *Definition.*

which in truth and justice it ought not to have. He however, like others before him, limits the application of the offence to certain instruments, though he adds *wills* to the list given by former writers. As experience grew, and the true principle of the offence became more considered and better understood, more modern definitions have taken a larger scope. Mr. Justice Blackstone says, that forgery is "the fraudulent making or alteration of a writing to the prejudice of another's right." In Coogan's case Buller J. said, it is "the making a false instrument with intent to deceive;" as Eyre B. in Taylor's case, defined it to be "a "false signature made with intent to deceive." In the word *deceive* must doubtless be intended to be included an intent to *defraud;* and so it was defined by Grose J. in delivering the opinion of the Judges in the case of Parkes and Brown; viz. the false making a note or other instrument with intent to defraud. Again, Eyre B. in the case of Jones and Palmer defined it to be "the false making an instrument, which purports on the face (*a*) of it to be good and valid for the purposes for which it was created, with a design to defraud," &c.

4 Blac. Com. 247. and *vi.* post. 861.

Coogan's case, Mich. term 1787, post. f. 43.

Taylor's case, coram Justs. Nov. 1779, MS. Buller J. Post. f. 47.

Parkes and Brown's case, O.B. Dec. 1797. 2 Leach, 910. Post. f. 50. and *vi* Obrian's case, 2 Sess. Cas. 369.

Jones and Palmer's case, O. B. 1785, 1 Leach, 405.

Punishment.

The offence is punishable as a misdemeanor at common law. But it has been enhanced in such a variety of instances by different statutes, upon which it is now most usual to prosecute, that a compendious view of these, explained by adjudged cases, and illustrated by the principles of the common law, forms the principal subject for consideration upon this head of criminal jurisprudence. For this purpose I shall endeavour to class them under appropriate heads; taking care, whilst brevity is consulted in this respect, to preserve not only the substance, but in every material part the very words, of these statutes. I must premise however that as the Legislature in many of these acts have treated the offence of false personating others for fraudulent purposes in the same light as forgery strictly so called, and as the offences bear a close affinity to each other, often making parts of the same plot of deception, I shall for the present class them together as they occur; though there will be a separate reference to the offence of false personating in the ensuing chapter.

1 Hawk. ch. 70. f. 1.
4 Blac. Com. 247.
3 Bac. Abr. 277.
Post. f. 70.

(*a*) This must be understood in respect of the frame or terms of the instrument or writing itself, and not of any other collateral matter, as a *stamp*. *Vide* post. f. 45.

Ch. XIX. § 2. *General diviſion of the ſubject.*

I proceed now to conſider the ſubject as it falls properly under one or other of theſe inquiries;

1. *With what intent the act muſt be done.*
2. *What falſe making, inſertion, alteration, or erazure, amounts to forgery.*
3. *Of what things forgery may now be committed.*
4. *How far the validity in law of the thing forged, ſuppoſing it were true, is eſſential to forgery. Wherein is alſo to be conſidered what degree of ſimilarity is required between the counterfeit and the true inſtrument.*
5. *How far uſing a fictitious Name or perſonating the true man or fictitious character aſſumed at the time will affect the offence.*
6. *What is a publiſhing or uttering.*
7. *What ſhall make a perſon aſſiſting or acceſſary.*
8. *Some general rules touching the manner in which the offence is to be laid in the indictment and proved in evidence.*
9. *As to the competency of the witneſſes to the fact.*
10. *Judgment, and its conſequences.*

I. *With what intent the act muſt be done.*

Intent.
Ante, ſ. 1.
1 Hale, 683.
3 Bac. Abr. 278.
MS. Burnet.
Poſt. ſ. 32.
1 Hawk. ch. 70. ſ. 4. 11.
Noy. 99.
Moor, 619. 655.
Salk. 375.
2 Bac. Abr. 279.
Vide Tatlock v. Harris, 3 Term Rep. 181.

The deceitful and fraudulent intent appears from the definitions before given of this offence to be of the eſſence of it: this is indeed particularly expreſſed in the ſtatute 5 Eliz. c. 14. and in moſt if not all the other acts. Therefore one who raſed out the word *libris* in a bond made to himſelf and put in *marcis* was adjudged not guilty of forgery; becauſe there was no appearance of a fraudulent deſign to cheat another. But at any rate it is very dangerous to tamper in theſe matters, beſides the conſequence of vacating the ſecurity altogether. And it is ſaid that it would be forgery if it any way appeared to be done with a view of gaining an advantage to the party himſelf, or of prejudicing a third perſon.

Bigg's caſe, 3 P. Wms. 119.

Yet it was holden no objection to a ſpecial verdict that the forgery was not found to have been committed for the ſake of lucre or to defraud the party.

R. v. Ward, 2 Ld. Ray. 1466. poſt. ſ. 7.

But in all caſes of forgery, properly ſo called, it is immaterial whether any perſon be actually injured or not, provided any may be prejudiced by it.

II. *What*

Ch. XIX. § 4. *What a false making or altering.*

II. *What false making, &c. is sufficient.*

§ 4.

The very making, with such fraudulent intent and without lawful authority, of any instrument which at common law or by statute is the subject of forgery, is of itself a sufficient completion of the offence even before publication, and of consequence before any actual injury sustained: for though publication be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. And by the statute law the publication, with knowledge of the fact, is for the most part made a substantive offence.

Vide 1 Hawk. ch. 70 s. 27. Elliot's case, post. s 44. R. v. Goate, 1 Ld. Ray. 737. R. v. Ward, 2 Ld. Ray. 1469.

Forgery may even be committed by a party's making a false deed in his own name; as if he make a subsequent deed of feoffment, as of a date prior to a former deed of his own, conveying the same lands, thereby attempting to give the last an operation which in justice it ought not to have, in order to defraud his own feoffee.

1 Hawk. ch. 70. s. 2. 3 Inst. 169. Fost. 117. 1 Hale, 683. Pult. 47. b. 27 H. 6. 3. Moor, 655.

So if a bill of exchange payable to A. or order get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee in whose favour it was drawn, indorse it for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. So if one put off a note subscribed with his own name as the note of another, it is a false uttering and publishing within the statute.

Mead v. Young, 4 Term Rep. 28.

Brown's case, post. s. 49.

Making a fraudulent insertion, alteration, or erasure, in any material part of a true instrument, although but in a letter, and even if it be afterwards executed by another person, he not knowing of the deceit; or the fraudulent application of a true signature to a false instrument for which it was not intended, or vice versâ; are as much forgeries, as if the whole instrument had been fabricated; for any such alteration gives it a new operation. As by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated.

1 Hawk. ch. 70. s. 2. 4. 5. 3 Inst. 169, 170, 1. 1 Hale, 683. 4. 5. Dawson's case, post. s. 55 1 Stra. 18. Puckering's case, 1 Ander. 100. Teague's case, post. s. 55. Master v. Miller, 4 Term Rep. 320.

Expunging an indorsement on a bank note with a certain liquor (lemon juice) unknown to the jury was holden a rasing within the act, 8 & 9 W. 3. c. 20.

R. v. Bigg, 3 P. Wms. 419. Ld. King's MS. 98. post. s. 11.

Samuel Kinder procured a deed to be forged as from one J. Moore and his son, conveying a certain estate for life to

Kinder's case, Nottingham Sum. Ass. 1800, MS. Jud.

and Mich. Term following.

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Mary Kinder, and after the death of one of the ſuppoſed grantors he procured the forged deed to be altered by enlarging the grantee's eſtate to a fee; and was indicted and convicted for forging and uttering it in the ſtate to which it was ſo altered; and held well by all the Judges; for it was no leſs a forgery after than before ſuch alteration.

Vi. poſt. ſ. 55.

7 Hawk. ch. 70. ſ. 2. 6. Moor, 760. Noy, 101.

So the wilful inſertion of a legacy in another's will unknown to him prior to and at the time of its execution is a forgery. But a bare nonfeaſance or omiſſion is ſaid not to be ſuch: as by omitting a legacy out of a will which one is directed to draw for another; unleſs as ſome have holden ſuch omiſſion makes a material alteration in other parts of the will: as where by the omiſſion of a prior life eſtate to A. a preſent fee is paſſed to B., inſtead of a remainder as was intended.

§ 5. *Aſſuming to be the party to a true inſtrument.*

In all caſes the thing made muſt be falſe; for certainly a man cannot be guilty of forgery merely by paſſing himſelf off for the perſon whoſe real ſignature appears, although for the purpoſe of fraud, and in concert with ſuch real perſon; for there is no falſe making. But this appears to be a falſe pretence within the ſtat. 30 Geo. 2. c. 24.

Ante, 827.

Hevey's caſe, O. B. Jan. 1782, MS. Crown Caſ. Reſ. 125. and MS. Buller J. (1 Leach, 268. S. C.) *It is not forgery to paſs for the perſon whoſe indorſement is on a bill, and thereby to obtain credit in the name of another.*

John Hevey was indicted for that he having in his cuſtody a bill of exchange with the name, "Jer. Connell" thereunto ſubſcribed, purporting to bear date 19th Nov. 1781, and to have been drawn by one Jer. Connell for Smith, Moore, and Co., and directed to Richard Beatty and Co. London, for the payment of 30l. to one Barnard M'Carty or order, thirty-one days after ſight, the tenor of which ſaid bill is as follows:

"No. 59. £. 30 Bath Bank, Nov. 19th, 1781.
"Thirty-one days after ſight pay Mr. Barnard M'Carty
"or order £. 30 value received.
"For Smith, Moore, and Co.
"To Richd Beatty and Co. Jer. Connell.
"London.
"No. 19. Great St. Helen's."

on, &c. feloniouſly did forge, &c. upon the back of the ſaid bill of exchange an indorſement in the name of the ſaid Barnard M'Carty, and which purported to be an aſſignment of the ſaid bill of exchange by and under the hand-writing of

of the ſaid B. M'Carty, viz. "Barnard M'Carty," with intent to defraud William Maſters and Edward Beauchamp, &c. 2d Count for uttering and publiſhing the ſaid indorſement with the like intent. It appeared in evidence that the priſoner came to the ſhop of Beauchamp and Maſters, pawnbrokers, to buy a watch, and offered the bill in queſtion with the indorſement then written on it. They heſitated about taking of it; but the priſoner told them it was a good bill, that his name was Barnard M'Carty, and he had indorſed it, and that Beatty and Co. by whom the bill purported to be accepted were agents to the Bath bank. The pawnbrokers, ſtill doubting, ſent their ſervant to St. Helen's, to inquire whether it were a good acceptance, and he being told that it was by a man whom he ſaw there, on his return the proſecutors let the priſoner have the watch, and gave him the difference of the bill. It further appeared that the priſoner had procured the plate to be engraved ſome time before, containing the form of the bill in queſtion, and had printed ſeveral hundred copies. That he had always been known by the name of John Hevey. That no ſuch perſon as Smith, Moore, and Co. could be found in Bath; though there were ſuch names put on the door of a houſe, but the perſon who had been there had ran away. There were alſo the names of Beatty and Co. on a counting-houſe door in Great St. Helen's, and a man of the name of Beatty had lived there who ſaid he was a clerk, but he was ſince taken up and lodged in priſon. It further appeared that there was ſuch a man as Barnard M'Carty, and that the indorſement was in fact of his hand-writing. Aſhhurſt J. directed the jury, that if they thought there was no ſuch perſon as Barnard M'Carty, or that the indorſement was not his handwriting, they muſt of courſe find the priſoner guilty. But even if they were ſatisfied of thoſe facts, yet if they thought that the priſoner was not that perſon, but paſſed himſelf upon the proſecutors as ſuch, they ſhould find him guilty, and he would ſave the caſe for the opinion of the Judges, whether in point of law it were forgery. The jury found the priſoner guilty, and the facts that there was ſuch a perſon exiſting as Barnard M'Carty, and that the indorſement was of his hand-writing; but that the priſoner was not that perſon, but had paſſed himſelf upon the proſecutors as ſuch at the time he tendered the bill in payment. In Hilary term 1782

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all the Judges were of opinion that the case did not amount to forgery; for there was no false indorsement; the jury having found that the indorsement was truly made by a real person whose name it purported to be (*a*).

§ 6. *Resemblance to the true writing need not be perfect.* vi. 1 Hale, 184.

In all cases however it is to be observed that where the forgery consists in counterfeiting any other known instrument, it is not necessary that the resemblance should be an exact one: if it be so like as to be calculated to deceive where ordinary and usual observation is given, it seems to be sufficient. The same rule holds in cases of counterfeiting the seals and coining. Therefore though the word *pounds* and the water-mark words "*Bank of England*" were omitted

Ante, 86, 163. Elliot's case, post. f. 44.

(*a*) The prisoner was afterwards at the O. B. Feb. 1782, before Serjt. Adair, Recorder, indicted with his associates Richard Beatty and Bryan M'Carty, for a conspiracy to defraud, and they were all convicted. The indictment there charged that the defendants fraudulently and unlawfully conspired that Richard Beatty should write his acceptance to a certain paper-writing purporting to be a bill of exchange, &c. (the tenor of which was set out as before) in order that John Hevey might by such acceptance, and of the name B. M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange truly drawn at Bath by one Jer. Connell for Smith, Moore, and company, as partners in the business of bankers under the stile of *Bath Bank*, as persons well known to them the said defendants, and thereby fraudulently to obtain from the king's subjects goods and monies. That Richard Beatty, in pursuance of such conspiracy and agreement, *did* fraudulently and unlawfully *write his acceptance* to the said paper-writing to the tenor following; viz. Accepted 20th Nov. 81. R. B., well knowing the firm of Smith, Moore, and company to be fictitious. That the defendants procured the indorsement "B. M'Carty" to be written on the same; and that the said John Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to S. Read, as and for a good bill of exchange, truly drawn, &c. and accepted by the said Richard Beatty as a person able to pay the said sum of 30*l.* in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value 12 guineas, and 7*l.* 8*s.* in money. Whereas in truth at the time of drawing, accepting, and uttering the said bill there were no such persons as Smith, Moore, and company in the business of bankers at Bath, and the said Richard Beatty was not of sufficient ability to pay the said 30*l.* they the defendants well knowing the same; &c. whereby they defrauded the said S. Read of the said goods and monies.—All the facts charged were fully proved, except that no other evidence was given either of the fact of writing the acceptance or of the hand-writing of Richard Beatty than by a witness who proved that the bill, *with the acceptance written upon it*, was shewn to Richard Beatty, who, being asked whether it were a good bill? answered that *it was very good*. A question was thereupon, after conviction, reserved for the opinion of the Judges, Whether this evidence supported the allegation in the indictment that Richard Beatty *wrote the acceptance?* And in Easter term 22 G. 3. all the Judges were of opinion that it was proper evidence to be left to the jury, on which they might found their verdict that Beatty wrote the acceptance. MS. Gould and Buller Js and MS. Jud.

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in the body of a forged bank note, the paper of which was also thicker than ordinary, yet as it resembled a true note in other respects, it was holden to be sufficient. The further consideration of this question will be resumed in another place.

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Vide R. v. Jones, post. f. 11. post. f. 44.

III. *Of what Instruments, &c. Forgery may be committed.*

1. At common law. 2. By statute.

§ 7. *At common law.*

1. To what instruments the crime of forgery was applied at common law seems to have been very indistinctly marked. It was never doubted but that it extended to the falsification of records, and other instruments of a public nature; as a parish register, a privy seal, a licence from the Barons of the Exchequer to compound a debt, a certificate of holy orders, a protection from a member of parliament, or the like. It is equally clear that it extended to private deeds or instruments under seal; and as Hawkins and other writers think to wills also, by a parity of reasoning; though he admits that he does not find the point any where directly holden. And it is no matter of surprize to find so able a writer treading with so much caution in a path, now indeed too well beaten, but which previous to the time of the Revolution, when paper securities became much more common, had been but little explored. The few occasions which occurred in early times of transferring property by written instruments from one to the other were for the most part under seal. It was the most easy and practicable method when few persons among the laity could write, and therefore it was natural enough for the first writers on this subject to adapt the language of their definition to the common experience of the times. But such a distinction never appears to have been solemnly adopted; and the subject having since undergone much deeper and more frequent consideration, the modern definitions which have been before given are better adapted to the nature and principle of the offence, and to the prevention of its pernicious consequences to society. The last-mentioned writer stopped short even of the experience of his own and former times, when he proceeds to say that it seems to have been generally laid down as a rule that the counterfeiting of writings of an inferior nature (to deeds and wills) is not

Ante, f. 1.
3 Inst. 168, 9.
1 Hawk. ch. 70. f. 8, 9, 10.
1 Roll. Abr. 66.
2 Sid. 71.
3 Bac. Abr. 277. 9.

Vide 2 Stra. 749.

Ante, f. 1.

1 Hawk. ch. 70. f. 11.

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not properly forgery: but it appears that he was not satisfied with the authorities to which he refers in this respect, nor with the principal reason on which they were founded, namely, that such writings were of a private nature; a reason which, as he justly observes, would apply as well to deeds. And not being able to satisfy himself upon the subject, he suggests a distinction to be made between the counterfeiting of such writings (i. e. under seal, and public documents) as is allowed to be forgery properly so called, and the counterfeiting of other inferior writings; that the former is in itself criminal, whether any third person be actually injured thereby or not: but that the latter is no crime unless some one receive a prejudice by it. But however plausible this may be, it is by no means a solution of the difficulty. It is a mere conjecture which leaves the crime of forgery as indistinct in principle as before; and tends to confound it with the general class of cheats, the distinction between which was well settled in Ward's case. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced. But that to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes of 33 H. 8. c. 1. and 30 Geo. 2. c. 24. But further, it does not appear upon full consideration of the books to which Hawkins refers that it is any where adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causâ* or *malo animo*, is not punishable as forgery. The authorities referred to by him are all cases of actions for slander; many of them contradictory, and some since expressly denied to be law; all of them prior to Ward's case, where the general result of the authorities on this subject was plainly shewn to be against such a conclusion. But even with respect to those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, they amount to no more than this, that the imputation of counterfeiting letters or writings *frivolous*, or *of no moment*, or *from whence no damage could ensue*, or *of uncertain signification*, is not actionable. In none of these instances to be sure would the crime

Ward's case, post. 861.

Vide ante, 825.

Vide 3 Bac. Abr. 280. 13 Vin. Abr. 460. and 1 Rol. Abr. 66. Trem. P. C. 100.

Vide 3 Bulstr. 205. 1 Roll. Rep. 431.

crime amount to forgery; but it is plain that the objection would be to the ſubſtance, and not to the form of the writing; for the fraud and intention to deceive conſtitute the chief ingredients of this offence. And the very qualifications introduced afford ſome preſumption againſt the generality of the rule ſuppoſed to be deducible from thoſe authorities. But the following caſe has now ſettled the rule, that the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law.

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3 Bac. Abr. 278.

An information was filed by the Attorney-General charging that the defendant Ward being bound to deliver 315 tons and a quarter of allum of the value of 1000 l. to the Duke of Buckingham at a certain day then paſt, he the defendant wickedly contriving and intending the ſaid Duke of the ſaid allum to deceive and defraud, and with a wicked and fraudulent intent to avoid the delivery of the ſaid allum on, &c. at, &c. with force and arms upon the back of a certain certificate in writing ſigned by one A. N. falſely forged and counterfeited and cauſed to be forged and counterfeited a certain writing in the words and figures following:

Rex v. John Ward, Hil. 13 Geo. 1. 2 Ld. Ray. 1461. 2 Stra. 747. *Forging an order from one, to charge certain goods contained in a ſchedule to his account, and to appropriate part of the proceeds to the defendant's own uſe, &c. done with intent to defraud the principal, is forgery at common law, tho' the fraud were not effected.*

" Schedule

Tons.	C.
660 :	5
315 :	5
976 :	10

Mr. John Ward. I do hereby order you to charge the quantity of 660 tons and 1 quarter of allum to my account, part of the quantity here mentioned in this certificate; and out of the money ariſing by the ſale of the allum in your hand pay to Mr. W. Ward and yourſelf 10 l. for every ton according to agreement; and for your ſo doing this ſhall be your diſcharge. Buckingham. April 30th, 1706." To the evil example, &c. to the great damage of the ſaid Duke and againſt the peace, &c. A ſecond count charged him with publiſhing the ſame forged writing knowing it to be forged, &c.

After conviction it was moved in arreſt of judgment that the inſtrument ſet forth was not the ſubject of forgery at common law; but at moſt the offence was only puniſhable as a cheat, and not in this form; being merely a thing of a private nature, and in effect nothing more than a letter: and if the counterfeiting of a letter had been puniſhable as a forgery at common law, then the making of the ſtat. 33 H. 8. c. 1. to puniſh thoſe who got the money

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or goods of others under colour of falſe tokens or counterfeit letters was nugatory. That it no where appeared that the Duke had been prejudiced by this; which, if he had, it might have been indictable as a cheat, but not as for forgery at common law. But all the Court held that this was indictable as a forgery at common law. That none of the books confine the offence to the particular kinds mentioned in 3 Inſt. 169. and that as forging a writing not ſealed came within all the miſchief of forging a deed, the maxim applied, ubi eadem eſt ratio eadem eſt lex. That this was recognized in the preamble of the ſtat. 5 Eliz. c. 14. which recites that the forging of *writings* as well as of *deeds* was puniſhable by law before that ſtatute, but that offenders had been encouraged by the too great mildneſs of the puniſhments; and that the ſtat. 33 H. 8. c. 1. did not create new offences, but only enhanced the penalty where the fraud was executed. They alſo referred to ſeveral inſtances of indictments at common law for forging inſtruments not under ſeal; as a bill of lading (*a*), an acquittance (*b*), a warrant of attorney (*c*), a marriage regiſter (*d*), a bill of exchange (*e*), letters of credit to gather money (*f*), and others of a ſimilar kind (*g*). And they diſtinguiſhed this offence from cheats at common law, and upon the ſtat. 33 H. 8. c. 1. where the party received an actual prejudice, which was not neceſſary to conſtitute forgery; it being ſufficient if the party might be prejudiced by it.

Sed *vide* ante, 853, 4.

Fawcett's caſe, York Spring Aſſizes 1793, MS. Buller J. and MS. Jud. *One who was committed to gaol under an attachment for a contempt in a civil cauſe counterfeited*

Leander Fawcett, who was confined in the gaol of York under an attachment iſſued out of the Court of B. R. for a contempt, (but not for non-payment of money) which was indorſed "*By rule of Court for contempt, Dawſon ex parte "Fawcett,*" was tried before Buller J. at York on an indictment framed as for a miſdemeanor at common law; which charged in ſubſtance that A. Dawſon had proſecuted a writ

(*a*) R. v. Stocker, 5 Mod. 137. 1 Salk 342. 371. The indictment was quaſhed for uncertainty in the form: but the offence was not denied to be forgery,

(*b*) R. v. Ferrers, 1 Sid. 278. Trem. Entr. 129.

(*c*) Farr's caſe, T. Ray. 81. (*d*) Dudley's caſe, 2 Sid. 71.

(*e*) R. v. Sheldon, H. 34 Car. 2. Roll. 35.

(*f*) Savage's caſe, Stiles, 12.

(*g*) *Vide* R. v. Hales and Kinnerſly, 9 St. Tr. 77. and ib. 93. R. v. Gibſon, 1 Seſſ. Caſ. 428. and ib. 432. for forging promiſſory notes, and indorſements; and *vide* alſo in general 13 Vin. Abr. 460. Trem. P. C. 100. 2 Show. 20. Obrian's caſe, 7 Mod. 378. 2 Seſſ. Caſ. 366. 2 Stra. 1144.

of

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of attachment out of B. R. directed to the ſheriff of York, whereby he was commanded to attach the defendant, which writ was delivered to the ſheriff, and by virtue of which he arreſted the defendant; and that the ſheriff by his warrant committed him to the cuſtody of the gaoler; by virtue of which writ and warrant he was conveyed and detained in gaol for the cauſe expreſſed, there to remain until he ſhould be thence diſcharged by due courſe of law. That the defendant contriving the due courſe of law to hinder and pervert, and by falſe means, &c. to procure his diſcharge and effect his eſcape, &c. on the 26th of February, 33 Geo. 3. with force and arms at, &c. did forge, &c. a certain writing purporting to be ſigned in the name of the ſaid A. Dawſon, &c. and to contain his authority to the ſheriff for the defendant's diſcharge, &c. as follows: "To the high ſheriff "of the county of York, his deputy, &c. and gaoler.—As "to any writ, attachment, or any other proceſs or cauſe "whatſoever at the ſuit inſtance or promotion of me A. "Dawſon, by reaſon whereof Leander Fawcett is now de"tained a priſoner in your cuſtody, you may forthwith diſ"charge and ſet at liberty him the ſaid L. F. unleſs detained "at the ſuit of ſome other perſon; and for ſo doing this "ſhall be your warrant and indemnity. (Dated) 26th Feb. "1793. (Signed) A. Dawſon," and witneſſed by one R. W. That the defendant further contriving to complete his evil purpoſe, unlawfully wickedly and falſely did forge, &c. a certain other writing purporting to be an affidavit ſubſcribed and ſworn by one R. W. (the witneſs to the above order) before one J. P. one of the commiſſioners appointed for taking affidavits in B. R. &c. of the following tenor, (ſetting forth an affidavit of the execution of the before-mentioned order): whereas in truth and fact the paper-writing in the ſaid ſuppoſed affidavit mentioned was not the hand-writing of the ſaid A. D. nor by him ſubſcribed, nor the words "R. W." ſubſcribed as witneſſed thereto, nor the name R. W. &c. ſubſcribed to the ſaid ſuppoſed affidavit, the hand-writing of the ſaid R. W. And then it proceeded to charge that the defendant produced and ſhewed the ſaid ſeveral falſe forged and counterfeited writings to the then deputy ſheriff of the ſaid county, and that the defendant by colour and pretence of the forged order and affidavit

a pretended diſcharge as from his creditor to the ſheriff and gaoler, under which he obtained his diſcharge from gaol. Held a miſdemeanor at common law; although the attachment not being for non-payment of money, the order was in itſelf a mere nullity, and no warrant to the ſheriff for the diſcharge: and ſemble alſo indictable as a forgery.

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falsely knowingly and deceitfully obtained his discharge from imprisonment, and thereby effected his liberation out of the gaol, &c. in contempt, &c. There was another count in substance the same, for publishing the said order knowingly, &c. and thereby obtaining his discharge.

The defendant was convicted, and the following questions were reserved for the opinion of the Judges; 1. Whether the order were a matter of such a public nature that the counterfeiting of it would be a forgery at common law. 2. Whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. 3. Whether upon this indictment the prisoner could be convicted of an offence within the stat. 5 Eliz. c. 14. s. 3. 4. Whether if he could be so convicted, the punishment prescribed by that section of the statute is so far specific that it must necessarily be directed by the sentence. Upon the conference in Easter term 1793, the cases of Ward and Dickens were cited. Lord Kenyon C. J. and Eyre C. J. said that there was an injury to a third person, and that it was an interruption to public justice; but the latter thought it was not a forgery, but a cheat. The matter was adjourned to Trinity term, when Eyre C. J. was still not satisfied as to the forgery; though he thought the indictment good as for a cheat. But all the Judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority (*a*) also thought it was forgery at common law.

Ante, 861.

R. v. Gibbs, 1 East. R. 173.

In the subsequent case of Micah Gibbs an objection of a similar kind was started upon the absolute nullity of the writing (*b*) alleged to be counterfeited, supposing it to have been genuine: but no opinion was given on that point; as taking it to be a forgery, the sessions where the indictment was found, had no jurisdiction of it.

2. *By*

(*a*) Mr. Justice Buller's MS. only makes a quære as to the opinion of Eyre C. J. But it appears from other MSS. as well as his own, that the Judges all concurred to sustain the conviction on the general ground only before mentioned.

(*a*) The indictment there charged that the defendant being a person assessed to certain duties granted upon income by certain commissioners; and under pretence of being aggrieved, having appealed to certain other commissioners, and intending to deceive the commissioners of appeal, and to induce them to believe that the particulars

2. *By Statute.*

The ſtatutes relating to forgery may be diſtributed into ſeveral claſſes; as they relate,

1. *To Records.*
2. *To the public Funds and the Stocks of public Companies.*
3. *To Notes and other Securities of the Bank of England and other public Companies.*
4. *To Stamps.*
5. *To official Papers, Securities, and Documents.*
6. *To private Papers, Securities, and Documents.*

§ 8. *By ſtatute.*

§ 9. *a Records.*

1. By ſtat. 8 Hen. 6. c. 12. ſ. 3. " If any record or parcel of the ſame writ, return, panel, proceſs, or warrant of attorney in the King's Courts of Chancery, Exchequer, the one bench, or the other, or in his Treaſury, be willingly ſtolen, &c. or *avoided* by any clerk or by other perſon; becauſe whereof any judgment ſhall be reverſed, ſuch ſtealer, &c. or *avoider*, their procurators, counſellors, and abettors, thereof indicted and duly convicted by their own confeſſion or by inqueſt," (half of whom are to be officers of any of the ſame courts, and the other half common jurors) " ſhall be guilty of felony." The inquiry is alſo thereby directed to be made by the judges of the ſaid courts of the one bench or the other: which together with other matters of conſtruction on this ſtatute, ſo far as the ſame relates to ſtealing as well as avoiding ſuch records, has been already mentioned in another place. This ſtatute does not extend to the judges, clerks who are inferior to them being firſt named; but they as well as clerks are by the ſtat. 8 Ric. 2. c. 4. to pay a fine to the King, and make ſatisfaction to the party " for falſely entering pleas, or raſing rolls, or " changing verdicts to the diſheriſon of any one." Beſides which it is clear that all offences of this nature, whether committed by means of forgery or otherwiſe, tending to

8 H. 6. c. 12. *Vide* ante, tit. Larceny, p. 596. the ſame ſtatute at length.

1 Hawk, ch. 45. ſ. 4.

particulars of his income delivered in and the deductions claimed by him to be allowed had been inquired into, examined, and approved by one R Elſe, the clerk to the firſt named commiſſioners, and with a fraudulent intent to give effect to his appeal, and to evade the duty, at the bottom of a paper purporting to be a ſchedule of the defendant's income, did forge, &c the letters R. E. purporting to be the initials of the ſaid clerk, and did exhibit to the commiſſioners of appeal the ſaid paper, &c. againſt the peace, &c.

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avoid or interrupt the courſe of juſtice, are high miſdemeanors at common law.

1 Hawk. ch. 45 ſ. 5. 3 Inſt. 72. 2 Roll. Rep. 81. 11 Rep. 34.

But further, with reference to the offence now under conſideration, it has been holden that the word *avoid* is to be taken in a large ſenſe, and includes raſing, clipping, or any other kind of avoiding: and that not only any alteration of a record whereby the judgment is *reverſed*, (by which is to be underſtood *annulled*) but alſo whereby it is ſo made void as to be *reverſible*, is within the ſtatute 8 H. 6.; and that whether made before or after judgment, or whether or not afterwards amended by the Court. So if A. B. be outlawed by the name of A. C., and afterwards the record be altered from A. C. to A. B., this is within the ſtatute, becauſe the record as it ſtood againſt A. C. is thereby annulled, and the judgment prevented which might have been given on a writ of error for this defect: and the ſtatute was made in advancement of juſtice and to remedy the miſchief.

In no inſtance can the counterfeiting or alteration of any judicial proceſs or matter be leſs than a very high miſdemeanor, as tending to ſtop or impede the courſe of juſtice, or to incroach upon the judicial power.

2. *Public Funds, and Stocks of public Companies.*

§ 9. *b* *Public funds and ſtocks of public companies.* 8 Geo. 1. c. 22. 31 Geo. 2. c. 22. ſ. 77. 4 Geo. 3. c. 25. *Vide* 9 Geo. 1. c. 12.

2. The ſtats. 8 Geo. 1. c. 22. ſ. 1. and 31 Geo. 2. c. 22. ſ. 77. protect from forgery all the public funds then or ſince eſtabliſhed by the authority of parliament. The ſtats. 31 Geo. 2. c. 22. ſ. 77. and 4 Geo. 3. c. 25. ſ. 15. extend the ſame protection to the parliamentary funds or ſtocks of public companies, and the 8 Geo. 1. c. 22. eſpecially includes the South-Sea Company, as the ſtat. 9 Geo. 1. c. 12. and other acts eſpecially include particular orders and public annuities.

8 Geo. 1. c. 22. *Forging hand-writing of proprietors of ſhares in the funds of public companies, eſtabliſhed by parliament, or the* DIVIDENDS *thereof, or the hand-writing of perſons entitled to* ANNUITIES *in the public funds, or* DIVIDENDS *thereof, to convey*

The ſtat. 8 Geo. 1. c. 22. ſ. 1. reciting that divers frauds and abuſes had been committed "by forging and counterfeiting the hands of ſome of the proprietors of the ſhares of and in the capital ſtock and funds of ſuch body or bodies politic or corporate as are eſtabliſhed by act or acts of parliament in that behalf, or ſome of them, or by forging or counterfeiting the hands of perſons entitled to the dividends attending the ſaid ſhares, or ſome of them, or the hands of perſons entitled to annuities in reſpect whereof the proprietors have transferable ſhares in a capital ſtock or

" or ſtocks eſtabliſhed by act or acts of parliament in pro- " portion to their reſpective annuities; and divers frauds " and abuſes have been or may be committed by perſons " falſely and deceitfully perſonating the true and real pro- " prietors of the ſaid ſhares in ſtock annuities and dividends, " or ſome of them," &c. for better prevention enacts, " that if any perſon or perſons whatſoever from and after " the 1ſt of March 1721 ſhall forge or counterfeit, or pro- " cure to be forged or counterfeited, or knowingly and " wilfully act or aſſiſt in the forging or counterfeiting any " letter of attorney, or other authority or inſtrument to " transfer, aſſign, ſell, or convey, any ſuch ſhare or ſhares " or any part of ſuch ſhare or ſhares of and in ſuch capital " ſtock or ſtocks as aforeſaid, or any of them; or to receive " any ſuch annuity or annuities, dividend or dividends as afore- " ſaid, or any of them, or any part thereof; or ſhall forge or " counterfeit or procure to be forged, &c. or knowingly and " wilfully act or aſſiſt in the forging or counterfeiting any " the name or names of any the proprietors of any ſuch ſhare " or ſhares in ſtock, or of any the perſons entitled to any ſuch " annuity or annuities, dividend or dividends as aforeſaid, " in or to any ſuch pretended letter of attorney, inſtrument, " or authority; or ſhall knowingly and (*a*) fraudulently de- " mand or endeavour to have any ſuch ſhare or ſhares in " ſtock, or any part thereof, transferred, aſſigned, ſold, or " conveyed, or ſuch annuity or annuities, dividend or divi- " dends, or any part thereof to be received by virtue of any " ſuch counterfeit or forged letter of attorney, authority or " inſtrument; or ſhall falſely and deceitfully perſonate any " true and real proprietors of the ſaid ſhares in ſtock annui- " ties and dividends, or any of them, or any part thereof, " and thereby transferring or endeavouring to transfer the " ſtock, or receiving or endeavouring to receive the money " of ſuch true and lawful proprietor, as if ſuch offender " were the true and lawful owner thereof; in all or any " ſuch caſe all and every ſuch perſon and perſons (being " thereof lawfully convicted) ſhall be adjudged guilty of fe- " lony without benefit of clergy."

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the ſame; or PERSONATING *the proprietors, and thereby* TRANSFERRING *or* ENDEAVOURING *to transfer ſuch ſhares, annuities, or dividends; felony without clergy.*

(*a*) The ſtat. 31 Geo 2. c. 22. ſ. 77. has the word *or* here inſtead of *and*.

The ſtat. 31 Geo. 2. c. 22. ſ. 77. reciting doubts whether the abovementioned act extended to the like forgery and offences in relation to ſuch capital ſtocks and funds as had been

31 Geo. 2. c. 22. ſ. 77. *Extending provi- ſions of former acts more largely*

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been eſtabliſhed by authority of Parliament ſince the paſſing of that act, or that might be thereafter eſtabliſhed, re-enacts and extends in terms all the proviſions of the former act to " the capital ſtock or funds of any body or bodies politic or " corporate eſtabliſhed, *or which ſhall be eſtabliſhed*, by any " act or acts of Parliament," &c.

to ſtock, then or thereafter to be created by act of parliament.

4 Geo 3. c. 25. *Extending to future corporations.*

The ſtat. 4 Geo. 3. c. 25. ſ. 15. which continued the corporation of the Bank, extends the ſame proviſions to any " capital ſtock or ſtocks *of any body or bodies politic or corporate* " which *now are* or *hereafter ſhall be* eſtabliſhed by any act " or acts of Parliament," &c.

33 Geo 3. c. 30. *Reciting certain miſchiefs.*

By ſtat. 33 Geo. 3. c. 30. reciting that " the laws then " in being had been found inſufficient to prevent forgeries " and frauds in the transferring ſtocks, annuities, and other " public funds, transferable at the Bank of England; and " that for the better preventing ſuch forgeries and frauds in " future, it was neceſſary that further proviſion ſhould be " made, as well to prevent frauds practiſed by perſons taking " upon themſelves to make transfers in the books of the go- " vernor and company of the Bank of England, of ſtock or " annuities, or other funds, transferable as aforeſaid, " whereof ſuch perſons were not the true owners and propri- " etors, as to prevent forgeries of ſuch transfers in the names " of the true owners or proprietors. And that it was alſo " neceſſary, the better to prevent ſuch forgeries and frauds, " that the public accounts between the governor and com- " pany of the Bank of England and the ſeveral owners and " proprietors of ſtock, annuities, and other funds, transfe- " rable at the Bank of England, ſhould be ſecured from fal- " ſification by means of falſe entries therein, or of the " alteration of any of the words or figures thereof, or by any " other ways or means whatſoever:" enacts, " That from " and after the 10th of May 1793, if any perſon or perſons " ſhall wilfully make, or aſſiſt in making, any transfer of " any intereſt, part, or ſhare of or in any ſtock or ſtocks, " annuity or annuities or other funds, transferable at the " Bank of England, in any of the books of the ſaid gover- " nor, &c. in which transfers of ſtock, annuities, or other " funds, as aforeſaid, are made, in the name or names of " any perſon or perſons, not being the owner or owners, or " proprietor or proprietors of ſuch ſtock, annuities, or other " funds,

Perſons making, or aſſiſting in making, transfers of ſtock in any other names than the owners, guilty of felony.

" funds, transferable as aforesaid; with intent to defraud " the said governor, &c or any other body politic or corporate, or any person or persons whatsoever, such person " or persons so making, or assisting in making, such transfer " as aforesaid, shall be deemed guilty of felony, without " benefit of clergy."

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Also persons forging, or assisting in forging transfers, &c.

By s. 2. " If any person or persons whatsoever shall from " and after the 10th of May 1793, falsely make, forge, or " counterfeit, or cause or procure to be falsely made, forged, " or counterfeited, or shall willingly act or assist in the " falsely making, forging, or counterfeiting of any transfer " of any interest, part, or share of or in any stock or stocks, " annuity or annuities, or other funds, transferable, or " which by any act or acts of parliament shall hereafter be " made transferable, at the Bank of England, or of or in " the capital stock belonging, or which hereafter shall or " may belong to the said governor, &c. called bank stock; " or shall utter or publish as true any such false, forged, or " counterfeited transfer as aforesaid, knowing the same to " be false, forged, or counterfeited; with intent to defraud " the said governor, &c. or any other body politic or corporate, or any person or persons whatsoever; all and every " person or persons whatsoever so offending shall be deemed " guilty of felony without benefit of clergy."

And also persons making, or assisting in making, false entries in the books of the Bank, &c.

By s. 3. " If any person or persons from and after the " said 10th of May 1793, shall wilfully make, or assist in " making, any false entry, or shall wilfully alter, or assist in " altering, any word or figure in any entry in the books of " account kept by the said governor, &c. wherein the several accounts of the owners or proprietors of stock, annuities, or other funds, transferable at the Bank of England, " are entered and kept; or shall in any manner wilfully " falsify the accounts of such owners and proprietors in the " books of the said governor and company, wherein such " accounts are entered and kept, with intent to defraud the " said governor, &c. or any other body politic or corporate, " or any person or persons whatsoever; every such person " or persons so offending shall be deemed guilty of felony " without benefit of clergy."

Sect. 4. reciting that " whereas in order to cover and " conceal forgeries and frauds in transfers, dividend war-

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" rants have been ſometimes made out for different ſums " than the ſums really due;" enacts, " that if any clerk, " officer, or ſervant of, or other perſon or perſons employed " or intruſted by the ſaid governor and company ſhall, from " and after the ſaid 10th of May 1793, knowingly or wil- " lingly make out or deliver, or cauſe or procure to be made " out or delivered, or willingly act or aſſiſt in the making " out or delivering, of any dividend warrant for a greater or " leſs amount than the perſon or perſons on whoſe behalf, " or pretended behalf, ſuch dividend warrants ſhall be made " out, is or are entitled to; with intent to defraud the ſaid " governor, &c. or any other body politic or corporate, or " any perſon or perſons whatſoever; all and every ſuch " perſon or perſons ſo offending, and being convicted of ſuch " offence or offences as aforeſaid ſhall be tranſported for " ſeven years."

Perſons making out, &c. falſe dividend warrants, to be tranſported for ſeven years.

37 Geo. 3. c. 122 *Reciting the mode of transferring ſtock.*

The ſtat. 37 Geo. 3. c. 122. reciting that " Whereas by " the ſeveral ſtatutes creating and authorizing the transfer of " the public ſtocks, &c. transferable at the Bank of England, " it is provided, that all aſſignments, or transfers thereof, " ſhall be entered and regiſtered in books to be kept by the " accountant-general of the Bank, which entries ſhall be ſign- " ed by the parties making ſuch aſſignments or transfers, or " if ſuch parties be abſent, by their reſpective attorney or at- " tornies thereunto lawfully authorized in writing under their " hands and ſeals, *to be atteſted by two or more credible wit- " neſſes;* and the ſame regulation is preſcribed and obſerved " with reſpect to the atteſtation of letters of attorney for the " transfer of any part of bank ſtock:" and further reciting that by the ſtat. 9 Ann. (c. 21.) and other acts, and by the charter of the (South-Sea) company the like regulations prevail in transfers of South-Sea ſtock; and alſo of Eaſt-India ſtock by the regulations of that company; " and that it is " expedient that proviſion ſhould be made for the prevention " of all frauds and impoſitions upon the ſaid reſpective " governors and companies and the ſaid united company, " reſpecting the transfer of, or the receipt of dividends " upon, any of the public funds or annuities, transferable " at the Bank of England, or of bank ſtock, or of the capital " ſtock of the ſaid South-Sea company, or of the ſaid united " company, or any other ſtocks or funds ariſing thereout, or " transfer-

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" transferable, or which ſhall hereafter be made transferable, at the South-Sea houſe or Eaſt-India houſe reſpectively :" enacts, " That if any perſon or perſons whatever " ſhall from and after the 1ſt of Auguſt 1797, falſely make, " forge, or counterfeit, or cauſe or procure to be falſely " made, forged, or counterfeited, or ſhall willingly act or " aſſiſt in the falſely making, forging, or counterfeiting the " name or names, hand-writing or hands-writing of any " perſon or perſons as, or purporting to be, the witneſs or " witneſſes atteſting the execution of any letter of attorney, " or other authority or inſtrument, to transfer, aſſign, ſell, or " convey any intereſt, part, or ſhare, of or in any ſtock or " ſtocks, annuity or annuities, or other funds, or the divi- " dends thereof, transferable, or which, by any act or acts " of parliament, ſhall hereafter be made transferable at the " Bank of England, or of or in the capital ſtock belonging, " or which hereafter ſhall or may belong, to the governor, &c. " of the Bank of England, called bank ſtock, or to the gover- " nor, &c. (of the South-Sea company), or under their care " or management, or of or in the capital ſtock belonging, or " which hereafter ſhall or may belong, to the ſaid united " company, &c. trading to the Eaſt-Indies, commonly " called Eaſt-India ſtock, or of any letter of attorney, or " other authority or inſtrument, to receive any dividend or " dividends on any of the ſaid ſtocks, annuities, or other " funds; or ſhall utter or publiſh, as true, any ſuch letter " of attorney, or other authority or inſtrument, containing " ſuch falſe, forged, or counterfeited name or names, hand- " writing or hands-writing, of ſuch atteſting witneſs or wit- " neſſes as aforeſaid, knowing ſuch name or names, hand- " writing or hands-writing, to be falſe, forged, or counter- " feited; all and every perſon or perſons whatever ſo " offending, and being convicted of any ſuch offence or " offences as aforeſaid, ſhall be adjudged guilty of felony, " and ſhall be tranſported for ſeven years; or ſhall be ad- " judged to ſuffer ſuch leſſer puniſhment as the Court, " before whom ſuch offender or offenders ſhall be tried, " ſhall think fit to award." This is made a public act.

Perſons forging the names of witneſſes to inſtruments for the tranſfer, or receipt of dividends, of ſtocks at the Bank, or of the South Sea or Eaſt India Company's ſtocks, to be guilty of felony, and be tranſported for 7 years, or ſuffer ſuch leſſer puniſhment as the Court ſhall award.

The ſtats. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. for making certain annuities created by the parliament of Ireland tranſferable, and the dividends thereon payable at the Bank

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of England, &c. enact, (ſ. 2.) " That it ſhall and may be " lawful for the governor, &c. of the Bank of England to " authorize and direct their accountant-general for the time " being to keep books wherein all aſſignments or transfers " of the ſaid (i. e. therein before mentioned) annuities and " principal ſums or ſtock ſhall be entered and regiſtered in " ſuch manner as the ſaid governor, &c. ſhall direct; which " entry ſhall be ſigned by the parties making ſuch aſſign- " ments or transfers, or if ſuch parties be abſent, by their " reſpective attorney or attornies thereunto lawfully autho- " rized in writing under his her or their hand and ſeal, or " hands and ſeals, to be atteſted by two or more credible " witneſſes; and that the ſeveral perſons to whom ſuch " transfers ſhall be made ſhall reſpectively underwrite their " acceptance thereof by themſelves or by their reſpective " attorney or attornies thereunto lawfully authorized in " manner aforeſaid; and that no other method of aſſigning " or transferring the ſaid annuities and principal ſum or " ſtock, or any part thereof, or any intereſt therein, ſhall be " good or available in law. Provided that no ſtamp duties " whatſoever ſhall be charged on any of the ſaid transfers, " nor on any receipt for any payment in reſpect of the ſaid " annuities, or the ſaid principal ſums, or ſtock, or the in- " tereſt thereof," &c.

35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. *Regulations for transferring the payment of certain annuities and dividends from Ireland to the Bank of England.*

Forging receipts for ſubſcriptions to loans or debentures under the reſpective acts, either with or without names of ſubſcribers; or altering ſuch; death.

By ſ. 3. reciting that " whereas for the prevention of " forgeries and frauds in reſpect of the receipts, payments, " and transfers made or given in purſuance of this act, it is " neceſſary that the like proviſions ſhould be enacted as by " the laws now in being are already in force reſpecting " ſtocks, annuities, and other public funds transferable at " the Bank of England, be it enacted that from and after " the paſſing of this act, if any perſon or perſons ſhall forge " or counterfeit, or cauſe or procure to be forged or coun- " terfeited, or (*a*) wilfully act or aſſiſt in the forging or " counterfeiting any receipt or receipts for the whole or any " part or parts of the ſaid ſubſcriptions, or contributing to- " wards the ſaid (loans or principal ſums reſpectively,) or " any debenture or debentures purporting to entitle any " perſon or perſons or body politic or corporate whatſoever " to any principal ſum or the intereſt thereon, or any an- " nuity or part of any principal ſum, intereſt, or annuity, " payable

((*a*) The ſtat. 8 Geo. 2. c. 22. has the words *knowingly and wilfully.*)

" payable under the said (respective acts of parliament of Ireland) either with or without the name or names of any " person or persons, or body politic or corporate being in- " serted therein as the subscriber or subscribers, or contri- " butor or contributors, or payer or payers, towards the said " (loans or principal sums respectively) or any part or parts " thereof; or shall alter any number, figure, or word there- " in; or utter or publish as true any such false, forged, " counterfeited, or altered receipt or receipts, debenture or " debentures, with intention to defraud the governor and " company of the Bank of England, or any body politic or " corporate, or any person or persons whatsoever; every " such person or persons so forging or counterfeiting, or " causing or procuring to be forged or counterfeited, or " wilfully acting or assisting in the forging or counterfeit- " ing, or altering uttering or publishing as aforesaid, shall " be deemed guilty of felony without benefit of clergy (*a*)."

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Sect. 4. contains the same provision as the stat. 8 Geo. 1. c. 22. s. 1. before mentioned, adding the word *interest* to " annuities or dividends" there mentioned; and s. 7, 8, 9, & 10. re-enact the provisions of the stat. 33 Geo. 3. c. 30. before stated.

Ante, 866.

Ante, 868.

By s. 5. " If any person or persons shall forge, counter- " feit, or alter any dividend warrant, or warrant for payment " of any annuity, interest or money payable in pursuance of " this act (respectively) at the Bank of England, or any in- " dorsement thereon; or shall offer or dispose of or put away " any such forged counterfeited or altered dividend warrant, " or warrant for payment of any annuity, interest, or mo-

Forging or uttering forged dividend warrants.

(*a*) This is a common clause, the substance of which is to be found in other acts for raising new loans. *Vide* 41 Geo. 3. (U. K.) c. 3. s. 24. The last of these acts in print is the 42 Geo. 3. c. 8. s. 26. whereby " if any person or per- " sons shall forge or counterfeit, or cause or procure to be forged, &c. or shall " willingly act or assist in the forging, &c. any certificate or certificates, receipt or " receipts, directed to be made out by this act, or any assignment thereof or in- " dorsement thereon, or shall alter any number, figure, or word, in any such cer- " tificate or receipt, or in any assignment thereof, or indorsement thereon; or " utter or publish as true any such false, forged, counterfeited, or altered certifi- " cate or certificates, receipt or receipts, or assignment or assignments ther of, or " indorsement or indorsements thereon; with intent to defraud his Majesty, or " the governor and company of the Bank of England, or any body politic or cor- " porate, or any person or persons whatsoever;" every such offender shall on conviction be adjudged guilty of felony without clergy.

" ney,

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" ney, payable as aforeſaid, or the indorſement thereon; or " demand the money therein contained or pretended to be " due thereon, or any part thereof, of the ſaid governor and " company of the Bank of England, or any their officers or " ſervants; knowing ſuch dividend warrant, &c. to be " forged, counterfeited, or altered; with intent to defraud " the ſaid governor, &c. or their ſucceſſors, or any other " body politic or corporate, or any perſon or perſons whatſo- " ever; every perſon or perſons ſo offending ſhall be deemed " guilty of felony without benefit of clergy."

The ſubſtance of this clauſe as a general proviſion is to be found in the ſtat. 15 Geo. 2. c. 13. ſ. 11. after mentioned.

Poſt. ſ. 10.

Gade's caſe, O. B. Feb. 1796, MS. Jud. *An indictment for forging a tranſfer of a ſhare in the 3 per cents. charged that W. H. was poſſeſſed of and entitled to ſuch ſhare; and the evidence was that the former owner had tranſferred the ſame into the name of the ſaid W. H. who was entitled to it by virtue of a bequeſt, but that W. H. had not accepted ſuch tranſfer as required by ſtat. 33 Geo 3. c. 28.: yet held well upon the ſtat. 33 G. 3. c. 30.; nor is it any objection that ſuch tranſfer was not witneſſed as required by the regulations at the Bank in the printed form, in which tranſfers are there made.* (2 Leach, 847. S. C.)

John Henry Gade was tried before Lawrence J. at the Old Bailey, February 1796, on an indictment charging that William Harriſon *was poſſeſſed of and entitled to* 50*l.* intereſt or ſhare in the conſolidated 3 per cent. annuities; and that the priſoner whilſt W. H. was ſo poſſeſſed of and entitled to the ſaid 50l. &c. did falſely make forge and counterfeit *a tranſfer* of the ſaid 50l. intereſt or ſhare, with the name of the ſaid W. H. thereto ſubſcribed, purporting to have been ſigned by the ſaid W. H., and to be a tranſfer of the ſaid 50l. &c. from the ſaid W. H. unto one W. W., the tenor of which is as follows; (ſetting it out); with intent to defraud the governor and company of the Bank of England, contrary to the form of the ſtatute, &c. Other counts charged the intent to be to defraud W. H. and W. W. Others charged the priſoner with publiſhing the tranſfer, knowing it to be forged, with the ſame intent. And others again charged the priſoner generally with forging a certain tranſfer, to wit, a tranſfer of an intereſt and ſhare, viz. 50l. intereſt and ſhare of and in certain annuities tranſferable at the Bank of England, commonly called " conſolidated " 3 per cent. annuities," without ſtating to whom the ſtock belonged, or reciting the ſtatutes relating thereto, in fraud of the ſame ſeveral perſons.

In ſupport of the charge it was proved that the priſoner and Henry Harland being executors of John Howard who had by his will given 50l. in the 3 per cent. conſols to his grandſon William Harriſon, on the 11th January 1796 tranſfer-

transferred the same into the name of William Harrison; *but the transfer never was accepted by William Harrison.* That afterwards, on the 14th of January, the prisoner brought his own son with him to the Bank, whom he represented to be William Harrison; and by the intervention of a broker the stock was agreed to be sold to William West; and the prisoner's son in his presence signed the transfer, which was properly filled up: but as he wrote the name "Harrisson" with a double (ss) it was required of him to bring an affidavit that he was the person described in the books of the Bank by the name of Harrison with a single (s); in consequence of which the broker did not pay over the money he had received from West for the stock, and the transfer was not witnessed; which according to the printed form of transfers used at the Bank should be done. It appeared also on the examination of clerks of the Bank that dividends may be received on stock before it is accepted; but that there are positive orders not to transfer any stock till it has been accepted; which the clerks should see done: but that with the stock-jobbers transfers are too often made without the stock being first accepted.

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It was objected for the prisoner that as the stat. 33 Geo. 3. c. 28. requires "that the books shall be kept at the Bank "for the entering of all transfers, which shall be conceived "in proper words for that purpose, and signed by the parties "making such transfers, and that the several persons to "whom such transfers shall be made shall underwrite their "acceptance thereof, and no other method of transferring "or assigning the said annuities shall be good or available "in law;" that the evidence did not support the indictment: first, For want of the acceptance of Harrison of the transfer made to him by the executors of Howard; till which time it was contended that the transfer was incomplete, and Harrison was not possessed of the 50l. stock. Secondly, Because that till the stock was accepted no transfer at all could be made. 3dly, Because the instrument given in evidence as a transfer in the name of William Harrison was not witnessed; which being, as was contended, a part of the words in which transfers were conceived, the instrument was not available in law, and therefore no transfer. And the want of witnessing was compared to the omissions in the bill of

A clause of the same sort as that before set out in the 33 Geo. 2. c. 66. *which is also to be found in other statutes Vide* 2 Leach, 855.

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of exchange in Moffat's case, Leach, 337. (*a*) The jury found the prisoner guilty, but sentence was respited till the Judges could be consulted on these objections: and in Easter term 1796 they were all over-ruled, and the offence was holden to be complete.

The indictment in the above case was supported in argument by the counsel for the prosecution on the 2d sect. of the stat. 33 Geo. 3. c. 30. And in the June sessions following Mr. Justice Buller is stated to have delivered the opinion of the Judges to this effect. After stating the objections, which had been urged in the Exchequer-chamber, he observed as to the two first that two answers had been given, 1. That the stock vested in W. H. by the mere act of transferring it into his name; and that if he had died before he had accepted it, yet it would have gone to his executors as part of his personal estate. 2. That the nature of the offence would not have been altered if W. H. had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete if Harrison had really had no stock. As to the 3d objection, that the Judges all thought that the entry and signatures as stated in the indictment were a complete transfer without the attestation of witnesses, which was no part of the instrument, but only required by the Bank for their own protection ex abundanti cautelâ.

2 Leach, 866.

3. *Notes and other Securities of the Bank of England and other public Companies.*

§ 10. *Notes, &c. of the Bank of England.* 15 Geo. 2. c. 13. s. 11. *Forging Bank notes, bills, dividend warrants, bonds, or indorsements; or offering, &c. the same, or demanding money thereon, &c. capital felonies.*

1. *Of the Bank of England.* The st. 15 Geo. 2. c. 13. s. 11. enacts, "That if any person or persons shall forge counterfeit or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the said company, (i. e. Bank of England) or any indorsement thereon, or shall offer, or dispose of, or put away any such forged counterfeit or altered note, &c. or the indorsement thereon, or demand the money therein contained or pretended to be due thereon, or any part thereof of the said company or any their officers or

(*a*) Last edit. 2 vol. 483.

"servants,

" ſervants, knowing ſuch note, &c. to be forged counter- " feited or altered, with intent to defraud the ſaid company, " or their ſucceſſors, or any other perſon or perſons what- " ſoever; every perſon or perſons ſo offending, and being " thereof convicted in due form of law, ſhall be deemed " guilty of felony without benefit of clergy."

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By ſeveral ſtatutes paſſed in the reign of King William 3. " the forging or counterfeiting the common ſeal of the cor- " poration of the governor and company of the Bank of " England," is made felony without benefit of clergy; which proviſion ſtill remains; for the ſtat. 11 Geo. 1. c. 9., which left ſeveral of the offences contained in thoſe acts ſimple felonies, makes no mention of the common ſeal, and reſerves all the pains and penalties, &c. of former acts not thereby altered.

Vide Biggs's caſe and Jones's caſe, poſt ſ. 11. 7 & 8 W. 3. c. 30. ſ. 36. 8 & 9 W. 3. c. 20. ſ. 36. 11 Geo 1. c 9. *Seal of the Bank.*

By 13 Geo. 3. c. 79. ſ. 1. " If any perſon or perſons " (other than the officers, ſervants, workmen, or agents for " the time being of the governor and company of the Bank, " to be authoriſed and appointed by them for that purpoſe, " and for the uſe of the ſaid governor and company only), ſhall " make or uſe, or cauſe or procure to be made or uſed, or " knowingly aid or aſſiſt in making or uſing, or [without be- " ing authoriſed as aforeſaid] ſhall knowingly have in his her " or their cuſtody or poſſeſſion, without lawful excuſe, [the " proof whereof ſhall lie on the perſon accuſed] any frame, " mould, or inſtrument, for the making of paper, with the " words *Bank of England* viſible in the ſubſtance of ſuch pa- " per; or ſhall make, or cauſe or procure to be made, or know- " ingly aid or aſſiſt in the making any paper, in the ſubſtance " of which the ſaid words *Bank of England* ſhall be viſible; or " if any perſon (except as before excepted) ſhall by any art or " myſtery or contrivance cauſe or procure the ſaid words *Bank* " *of England* to appear viſible in the ſubſtance of any paper " whatſoever; or knowingly aid or aſſiſt in cauſing the ſaid " words *Bank of England* to appear in the ſubſtance of any " paper whatſoever, every ſuch offender ſhall, being thereof " lawfully convicted, be adjudged a felon without benefit of " clergy."

13 Geo. 3. c. 79. *making or knowingly having in poſſeſſion inſtruments for making paper with the words* BANK OF ENGLAND *viſible in the ſubſtance of it, a capital felony.*

And after reciting (ſ. 2.) " that perſons have taken in " payment and otherwiſe received notes, inland bills, and " bills

Engraving notes, &c. with like words or with

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the SUMS IN WHITE LETTERS ON BLACK GROUND, *or knowingly having ſuch in poſſeſſion, or uttering, &c. ſubject to impriſonment.*

" bills of exchange, with certain words and characters ſo " nearly reſembling the notes and bills of the ſaid governor " and company as to appear to ſuch perſons to be the notes " or bills of the Bank of England; to the great prejudice of " public credit," it is enacted, " that if any perſon or per- " ſons, without being authoriſed and appointed as aforeſaid, " ſhall engrave, cut, etch or ſcrape in mezzotinto, or cauſe " or procure to be engraved, &c.; or ſhall knowingly aid or " aſſiſt in the engraving, &c. in or upon any plate of cop- " per, braſs, ſteel, pewter, or of any other metal or mixture " of metals, or upon wood, or any other material or any " plate whatſoever, any promiſſory note, inland bill, or bill " of exchange, or blank promiſſory note, inland bill, or bill " of exchange, or part of a promiſſory note, inland bill, or " bill of exchange, containing the words *Bank of England*, " or *Bank poſt bill*, or any word or words expreſſing the ſum " or amount, or any part of the ſum or amount of ſuch " promiſſory note, inland bill, or bill of exchange, *in white* " *letters or figures on a black ground;* or ſhall uſe any ſuch " plate ſo engraved, &c. or ſhall uſe any other inſtrument " for the making or printing any ſuch promiſſory note, in- " land bill, or bill of exchange, or blank promiſſory note, " inland bill, or bill of exchange, or part of a promiſſory " note, inland bill, or bill of exchange; (or (*a*)) if any per- " ſon or perſons (without being authoriſed and appointed as " aforeſaid) ſhall knowingly have in his her or their cuſtody " any ſuch plate or inſtrument, or ſhall knowingly and wil- " fully utter or publiſh any ſuch promiſſory note, inland " bill, or bill of exchange, blank promiſſory note, inland " bill, or bill of exchange; every ſuch offender ſhall, being " convicted thereof, be committed to the common gaol of " the county or place where the offence ſhall be committed " for any ſpace not exceeding ſix months." With a proviſo (ſ. 3.) not " to extend to ſuch perſon, who being poſſeſſed " of any ſuch note or bill, ſhall only utter the ſame by car- " rying the ſame for payment to the iſſuers, drawers, ac- " ceptors, or indorſers thereof reſpectively, or uſing proper " means to compel the payment of any ſuch note or bill."

(*a*) The word *or* is here omitted in Runnington's edition of the Statutes, probably by a miſtake of the preſs.

The

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41 Geo. 3. (U. K.) c. 39. *Making or having in possession without authority any instrument for making paper of the sort therein described WITH CURVED BAR LINES, or the SUMS APPEARING IN THE SUBSTANCE OF THE PAPER, or procuring the numerical sum of any Bank note, &c. to appear visible in the substance of the paper, &c felony and transportation for 14 years.*

The ſtat. 41 Geo. 3. c. 39. reciting that "whereas the "forgery of bank notes, bank bills of exchange, and bank "poſt bills had much increaſed, and that to prevent it, and "alſo to facilitate the detection of it, the Bank of England "had procured to be made for the future iſſue of bank "notes, &c. a new paper of a different manufacture from "that formerly uſed either by the bank or any other; "in which new paper inſtead of the bar lines being ſtraight "and parallel to each other, as in the paper heretofore uſed, "the ſame are curved or waving, and the laying wire lines "are alſo formed in a waved or curved ſhape, and the nu-"merical account or ſum of each bank note, &c. expreſſed in "a word or words in Roman letters, is made to appear viſible "in the ſubſtance of the paper. And whereas it is expe-"dient, for the better prevention of the forgery of bank "notes, &c. that the ſaid governor and company ſhould have "the excluſive privilege of uſing, in the iſſue of their notes "and bills, the paper hereinbefore deſcribed, it is enacted "that if any perſon or perſons, (other than the officers, "workmen, ſervants, or agents for the time being, of the "ſaid governor, &c. to be authoriſed and appointed for that "purpoſe by the ſaid governor, &c. and for the uſe of the "ſaid governor, &c. only) ſhall make or uſe, or cauſe or "procure to be made or uſed, or knowingly aid or aſſiſt in "making or uſing; or (without being authoriſed or appointed "as aforeſaid) ſhall knowingly have in his, her, or their "cuſtody or poſſeſſion, (without lawful excuſe, the proof "whereof ſhall lie upon the perſon accuſed) any frame, "mould, or inſtrument, for the making of paper, with "curved or waving bar lines, or with the laying wire lines "thereof in a waving or curved ſhape, or with any number, "ſum or amount, expreſſed in a word or words, in Roman "letters, viſible in the ſubſtance of ſuch paper; or ſhall ma-"nufacture, make, uſe, vend, expoſe to ſale, publiſh or diſ-"poſe of, or cauſe or procure to be manufactured, &c. or "aid or aſſiſt in the manufacturing, &c.; or (without being "authoriſed or appointed as aforeſaid) ſhall knowingly have "in his, her, or their cuſtody or poſſeſſion any paper what-"ſoever, with curved or waving bar lines, &c. (as before;) "or if any perſon or perſons (except as before excepted)

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41 Geo. 3. c. 39.

" ſhall, by any art, myſtery, or contrivance, cauſe or procure " the numerical ſum or amount of any bank note, bank bill " of exchange, or bank poſt bill, blank bank note, blank " bank bill of exchange, or blank bank poſt bill, in a word " or words to appear viſible in the ſubſtance of the paper " whereon the ſame ſhall be written or printed; or ſhall " knowingly aid or aſſiſt in cauſing the numerical ſum or " amount of any bank note, &c. in a word or words in Ro- " man letters to appear viſible in the ſubſtance of the paper " whereon the ſame ſhall be written or printed; every per- " ſon or perſons ſo offending in any of the caſes aforeſaid, " and being convicted thereof according to law, ſhall be " adjudged a felon and ſhall be tranſported for the term of " 14 years."

Not to reſtrain the negotiation of bills already iſſued on ſuch paper.

By ſ. 2. " the act ſhall not extend to reſtrain or render " illegal the negociation, circulation, or re-iſſuing of any bill " or bills of exchange, promiſſory note, or promiſſory notes, " which have already lawfully been iſſued, negociated, or " circulated, or which ſhall or may be now lawfully re- " iſſued, negociated, or circulated, before the 1ſt of No- " vember 1801, notwithſtanding the ſame ſhall be written " or printed upon paper, which by this act is prohibited from " being manufactured, made, uſed, vended, expoſed to ſale, " publiſhed or diſpoſed of, except by the governor and com- " pany of the Bank of England; nor (by ſ. 3.) to extend to " reſtrain any perſon or perſons from iſſuing or negociating " any bill or bills of exchange, promiſſory note, or promiſſory " notes, having the ſum or amount thereof expreſſed in " guineas or in a numerical figure or figures denominating " the ſum or amount thereof in pounds ſterling, appearing " viſible in the ſubſtance of the paper upon which the ſame " ſhall be written or printed. Nor (by ſ. 4.) to reſtrain or " prevent any perſon or perſons from making, uſing, vend- " ing, expoſing to ſale, publiſhing, or diſpoſing of any paper " having waving or curved lines, or any other devices in the " nature of water-marks, viſible in the ſubſtance of the " paper, not being bar lines, or laying wire lines; provided " the ſame are not contrived in ſuch manner as to form the " ground-work or texture of the paper, or to imitate or re- " ſemble the waving or curved laying wire lines, or bar

Nor the iſſuing of bills with the amount expreſſed in guineas, or with figures in pounds, in the paper.

Nor the making or uſing paper with water marks not reſembling thoſe of the Bank.

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" lines of the ſaid new paper of the governor and company " of the Bank of England, or to imitate or reſemble the " water-marks uſed by the ſaid governor, &c. in the bank " notes, &c. iſſued by the ſaid governor, &c."

41 Geo. 3. c. 39. *Knowingly receiving or having in poſſeſſion forged Bank notes, &c. without lawful excuſe, felony and tranſportation for 14 years.*

Sect. 5. enacts, " That if any perſon or perſons ſhall from " and after the paſſing of this act purchaſe or receive from any " other perſon or perſons any forged or counterfeited bank " note, bank bill of exchange, bank poſt bill, or blank bank " note, blank bank bill of exchange, or blank bank poſt bill, " knowing the ſame to be forged or counterfeited; or ſhall " knowingly or wittingly have in his, her or their poſſeſſion " or cuſtody, or in his, her or their dwelling-houſe, out- " houſe, lodgings, or apartments, any forged or counter- " feited bank note, &c. knowing the ſame to be forged or " counterfeited, (without lawful excuſe, the proof whereof " ſhall lie upon the perſon accuſed) every perſon or perſons " ſo offending and being thereof convicted according to " law, ſhall be adjudged a felon and ſhall be tranſported for " the term of 14 years."

Engraving, &c. on plate, &c. any Bank note, &c. purporting to be of the Bank of England, or uſing ſuch plate, &c. or knowingly having ſuch in poſſeſſion without written authority, or uttering, &c. felony and tranſportation for ſeven years.

Sect. 6. reciting " That whereas the laws now in force " do not inflict a ſufficient puniſhment upon offenders con- " cerned in engraving plates and printing blank forms for " bank notes, bank bills of exchange, and bank poſt bills, " for the purpoſe of being made uſe of in perpetrating the " crime of forgery; enacts, that if any perſon or perſons " from and after the paſſing of this act ſhall engrave, cut, " etch, ſcrape, or by any other means or device make, or " ſhall cauſe or procure to be engraved, &c., or ſhall know- " ingly aid or aſſiſt in the engraving, &c. in or upon any " plate of copper, braſs, ſteel, pewter, or of any other metal, " or mixture of metals, or upon any wood, or any other " materials, or any plate whatſoever, any bank note, bank " bill of exchange, bank poſt bill, or blank bank note, blank " bank bill of exchange, or blank bank poſt bill, or part of a " bank note, bank bill of exchange, or bank poſt bill, pur- " porting to be the note or bill of exchange, or bank poſt " bill, or blank bank note, or blank bank bill of exchange, or " blank bank poſt bill, or part of the note or bill of exchange " or bank poſt bill of the governor and company of the Bank " of England, without an authority in writing for that pur-

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" poſe from the governor, &c.; or ſhall uſe any ſuch plate ſo " engraved, cut, etched, ſcraped, or by any other means or " device make (*a*); or ſhall uſe any other inſtrument or device " for the making or printing of any ſuch bank note, &c. (as " laſt before named) without ſuch authority in writing as " aforeſaid; or if any perſon or perſons ſhall, after the paſſing " of this act, without ſuch authority as aforeſaid, knowing- " ly have in his, her or their cuſtody any ſuch plate, inſtru- " ment or device; or ſhall without ſuch authority as afore- " ſaid knowingly and wilfully utter, publiſh, diſpoſe of, or " put away, any ſuch bank note, &c. (as laſt before named); " every perſon ſo offending and being thereof convicted " ſhall be adjudged a felon and tranſported for ſeven " years."

(*a*) Q. A miſprint for *made*.

Poſt.

The forgery of *private* documents of the bank will be hereafter conſidered.

§ 11. Rex v. Bigg, 3 P. Wms. 419. *Expunging by a certain liquor a notification of payment of part of the contents of a Bank bill written on the face of it, ſuſtains an indictment for* RAISING OUT AN INDORSEMENT *on ſuch bill.*

John Bigg was indicted (*a*) for raſing out an indorſement of 90*l.* made on a bank bill for 100*l.*, which indorſement was made by the agent of the Bank as for ſo much money before paid thereon to the bearer on behalf of the company; and a ſpecial verdict was found, ſtating that the priſoner did expunge the words and figures following, " 22*d February* 1714 *paid* 90*l.*" written with red ink *upon the face and inſide* of the note, with a certain liquor unknown. On the argument of the caſe before all the Judges at Serjeants' Inn, ſeveral objections were taken. 1. That Adams, who the indictment and verdict ſtated to have been entruſted by the bank to ſign notes, &c. for the company, was not properly authoriſed under the common ſeal. 2. That the receipt *on the face* of the note could not be called an *indorſement*. 3. That the taking it out by a liquor could not be called *a raſing*. 4. That the verdict ought to have found the raſure to have been for the

(*a*) The indictment was framed on the ſtat. 8 & 9 W. 3. c. 20. ſ. 36. which enacts " that the forging or counterfeiting the common ſeal of the corporation of " the Governor and Company, or of any ſealed Bank bill made or given out in " the name of the ſaid Governor, &c. for the payment of any ſum of money or of " any Bank note of any ſort whatſoever ſigned for the ſaid Governor, &c. of the " Bank of England, or the altering or *raſing* any *indorſement* on any Bank bill or " note of any ſort ſhall be and is hereby declared and adjudged to be felony with- " out benefit of clergy."

ſake

Ch. XIX. § 11. *By ſtatute. Of public ſecurities of the Bank.*

ſake of lucre, or to defraud the company, which it did not do. The printed report ſays, that the Judges differed in opinion, but the majority held it to be felony. But the fact was (as ſtated in the MS. quoted) that ten Judges agreed that it was felony, one was ill, and the other place was vacant.

Serjt. Forſter's MS. who cites Ld. King's MS. 98.

An indictment drawn on the ſtat. 15 Geo. 2. c. 13. ſ. 11. charged in the 3d count that the priſoner W. Jones having in his cuſtody a certain forged *paper writing purporting to be a bank note* (prout) did diſpoſe of and put away the ſame as and for a true bank note, with intent to defraud John Rayner. The fourth count only differed from the third in ſtating it to be *a note* inſtead of *a paper writing;* and the ſixth count charged that the priſoner uttered and publiſhed as true a forged paper writing *purporting to be a promiſſory note for payment of money.* The forged note was ſet forth as follows.

Rex v. Jones al. Thorowgood, B.R. M. 30 G. 3. 1779, Serjt. Forſter's MS. (Doug 302. and 1 Leach, 243. S. C.) *Upon a charge of forging a paper writing purporting to be a* BANK NOTE, *the reſemblance muſt appear on the face of the inſtrument, and cannot be ſupplied by what the priſoner ſaid that it was: and held that the ſignature being* "FOR SELF "AND CO. OF "MY BANK IN "ENGLAND," *had no ſuch purport.*

" No. F. 946."

" I promiſe to pay John Wilſon Eſq. or bearer Ten " Pounds."

" London March 4th 1776."

" £. Ten." " For ſelf and Company"

" Entd. John Jones." " of my Bank in England."

There were a ſet of counts charging the forgery to be with intent to defraud the bank: but the jury acquitted the priſoner on thoſe; and found ſpecially on the third count, that the paper writing therein ſet forth was not a note filled up by any of the officers of the Bank of England, nor entered in their books, but was forged. That the priſoner knowing the ſame averred it to be a good *bank note*, and put it away as ſuch to Rayner with intent to defraud him; and that Rayner believing it to be a good bank note gave the full value of it, and further that the Bank frequently pay bank notes which are filled up by their officers and entered in their books, though they happen not to be ſigned. The finding on the fourth count was the ſame, only calling it as in that count *a note* inſtead of a paper writing. On the ſixth they found that the ſaid paper writing, purporting to be a promiſſory note as in that count ſet forth, was not filled up, &c. and that the priſoner knowing, &c. uttered it as ſuch (as on

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the third count). The queſtion made on the argument was, whether this paper writing *purported* to be a *bank note?* And the Court, without hearing counſel for the priſoner were of opinion that it did not. *Lord Mansfield* ſaid, that the repreſentation of the priſoner afterwards could not vary the purport of the inſtrument: on the face of it, it did not purport to be a bank note. It was admitted by the counſel for the proſecution that the finding did not ſupport the ſixth count. The priſoner was diſcharged.

This caſe does not appear to have turned altogether upon the manner of laying the offence in the indictment: for the ſame objection did not apply to the 6th count which was framed upon the ſtats. 2 and 31 Geo. 2. An objection aroſe out of the very nature of the thing itſelf forged; namely, that it was no promiſſory or other note at all of the Bank or otherwiſe. In order to conſtitute forgery there muſt be ſome reſemblance to the thing ſuppoſed to be forged, though it need not be an exact one. The forged inſtrument muſt at leaſt have the principal conſtituent parts of that which it is intended to repreſent, which was wanting in the preſent caſe; and therefore the thing itſelf was no reſemblance of that which it was charged to be. Wherefore in caſes where any difficulty occurs in drawing the indictment upon the ſtat. 15 Geo. 2. for defect of ſimilitude between the forgery and the common form of bank notes, it ſeems beſt to frame the charge upon the other more general ſtatute of the 2 Geo. 2. c. 25. and its auxiliary ſtatutes, as was done in Elliott's caſe, and alſo in the ſixth count of Jones's caſe above referred to. It is however eſſential to the charge of forgery in every ſuch caſe that the note ſhould at leaſt purport to be drawn in ſome other name than that of the party himſelf charged with the crime, which did not ſo appear in this inſtance.

Ante, f. 6.

Poſt. f. 44.

§ 12. *South Sea Company.* 9 Ann. c. 21. 6 G. 1. c. 4. f. 56. 12 G. 1. c 32. f. 9.

In regard to the ſecurities of other public companies;

By ſtats. 9 Ann. c. 21. f. 57. and 6 Geo. 1. c. 4. f. 56. "If any perſon ſhall forge or counterfeit the *common ſeal* of "the South-Sea company; or ſhall forge, counterfeit or "alter any *bond* or *obligation* under their common ſeal, or "ſhall offer to *diſpoſe* of or *pay away* any ſuch forged, coun-

Ch XIX § 12. *By statute. Of public securities of the Bank.*

" terfeited or altered bond, knowing the same to be such; " or shall *demand the money* therein contained or pretended " to be due thereon, or any part thereof, of the said company " or any of their officers, knowing such bond or obligation to " be forged, counterfeited or altered; with intent to defraud " the said company or their successors, or any other person or " persons whatsoever; every such person and persons so of- " fending shall be guilty of felony without benefit of clergy."

12 Geo. 1. c. 32.

The stat. 12 Geo. 1. c. 32. s. 9. inflicts the same punish- ment on the " forging, or counterfeiting, or procuring to " be forged, &c. or willingly acting or assisting in the forg- " ing any *indorsement or assignment* on any bond or obligation " under the common seal of the governor and company of " merchants, &c. trading to the South-Seas, &c."

Ante, s. 9. 8 Geo. 1. c. 22. &c. 6 Geo. 1. c. 11. *Forging, &c. South Sea receipts or dividend warrants.*

Also, besides the general provision before stated to protect the stocks of public companies, the stat. 6 Geo. 1. c. 11. s. 50. reciting that the corporation, &c. trading to the S. S. &c. " may issue out *receipts* under the " hand or hands of one or more of their officers from " time to time upon or for subscriptions to be by the said " company taken for increasing their capital stock pursuant " to an act of the same session, and may also issue out *war-* " *rants* under the hand or hands of one or more of their " officers for the dividend from time to time to be made to " the proprietors of the stock in the said company; enacts, " that if any person or persons shall forge, counterfeit or " alter any such receipt or receipts, warrant or warrants, or " any indorsement or writing, indorsements or writings " thereupon or therein, or shall tender any such forged, coun- " terfeited or altered receipt or receipts, or warrant or war- " rants, or any such receipt or warrant, &c. with such coun- " terfeit indorsement or writing thereon or therein, knowing " the same to be so forged, counterfeited, or altered, to the " said company or any of their officers; or shall offer to alie- " nate or dispose of the same, knowing the same to be forged, " counterfeited or altered; and with intent to defraud the " said company or any other person or persons, bodies poli- " tic or corporate; every such person or persons so offend- " ing (being thereof lawfully convicted) shall be adjudged a " felon, without benefit of clergy."

Ch. XIX. § 13. *By ſtatute.*

§ 13. *London and Royal Exchange Aſſurance Companies, &c.* 6 Geo. 1. c. 18. ſ. 13. *Vide* alſo 39 G. 3. (c. 83) ſ. 22.

Proviſions ſimilar to thoſe in the ſtats. 9 Ann. c. 21. and 6 Geo. 1. c. 4. above mentioned, are made in reſpect to the London and Royal Exchange Aſſurance Companies, mutatis mutandis, only including further "any *policy* or *bill*," as well as bond or obligation *under the common ſeal* of either.

In like manner the Globe Inſurance Company is protected from forgery.

§ 14. *Eaſt India Company.* 12 Geo. 1. c. 32. ſ. 9.

It is alſo made felony without benefit of clergy if any perſon ſhall "forge or counterfeit, or procure to be forged, "&c. or willingly act or aſſiſt in the forging, &c. any *bond* "or *obligation* under the common ſeal of (the Eaſt-India "Company), or any *indorſement* or *aſſignment* thereon; or "ſhall *utter* or *publiſh* any ſuch, *knowing* the ſame to be "forged or counterfeited, with intent to defraud any per-"ſon (*a*) whatſoever, being thereof lawfully convicted."

§ 15. *Plate glaſs manufactory.* 13 Geo. 3. c. 38. ſ. 28. and 38 Geo. 3. c. 17. ſ. 23.

By ſtat. 13 Geo. 3. c. 38. ſ. 28. revived by ſtat. 33 Geo. 3. (c. 17.) ſ. 23. "If any perſon or perſons ſhall forge or "counterfeit the *ſeal* of the governor and company of the "Britiſh Caſt Plate Glaſs Manufactory, or any *deed* or "*writing* under their common ſeal; or ſhall *demand any* "*money* in purſuance of any ſuch forged or counterfeited "deed or writing, either from the ſaid corporation or any "members or ſervants thereof, knowing ſuch writing to be "forged, with intent to defraud the ſame corporation or "any other perſon or perſons whomſoever; every perſon ſo "offending, and being duly convicted, ſhall be guilty of "felony and ſuffer as a felon (*b*)."

4. *To Stamps.*

§ 16. *Vide* 3 Bac. Abr. 285. 1 Hawk. ch. 18. ſ. 9. in margin, and 12 Geo. 3. c. 48. as a general one.

Stamps denoting the payment of certain duties are required by various acts of parliament to be affixed on a multiplicity of written or printed documents. And for the purpoſe of protecting the revenue from fraud in counterfeit-

(*a*) The word *perſon* does not ſeem an appropriate term as applied to the ſubject matter, namely, a corporation. However, this ſeems included in the general acts of the 2 Geo. 2. c. 25. and 31 Geo 2. c. 22. ſ. 78.

(*a*) The firſt mentioned act, which had expired, directed the felon to be tranſported to America for a term not exceeding ſeven years; but that is omitted in the reviving act.

ing

ing, uttering, or vending the ſame knowingly, the reſpective acts (*a*) always contain a clauſe for the moſt part in the preciſe words following; though ſometimes with ſome verbal differences, which as far as have met my notice are marked below. I ſelect as the one moſt generally adopted in modern times the 5th clauſe of the ſtat. 37 Geo. 3. c. 90. which impoſes additional duties on a great variety of inſtruments therein mentioned; and alſo becauſe the ſame form is uſed (with the additional words, *mark* or *ſeal* as well as *ſtamp*) in the general conſolidating act of the 27 Geo. 3. c. 13. ſ. 46. which includes ſtamps impoſed by that and all former acts.

37 Geo. 3. c. 90. ſ. 5.

"If any perſon ſhall counterfeit or forge, or cauſe or "procure to be counterfeited or forged any ſtamp (*b*) di- "rected or allowed to be uſed by this act, or provided "made or uſed for the purpoſe of denoting the duties by "this act granted as aforeſaid, or any of them, or ſhall "counterfeit or reſemble the impreſſion of the ſame (*c*), "with an intent to defraud his Majeſty his heirs, &c. of "any of the ſaid duties; or ſhall utter, vend or ſell (*d*) "any vellum, parchment, or paper, liable to any ſtamp "duty by this act impoſed, with ſuch counterfeit ſtamp or "mark thereupon, knowing the ſame to be counterfeit; or "ſhall privately or fraudulently (*e*) uſe any ſtamp directed

(*a*) See the Index to Runnington's edition of the Statutes at large, title *Stamps*.

(*b*) The ſtatutes 31 Geo. 3. c. 25. ſ. 29. and 39 Geo. 3. c. 107. ſ. 25. repealing old and impoſing new duties on bills of exchange, promiſſory notes and other notes, drafts and orders, and on receipts; and the ſtat. 35 Geo. 3. c. 63. ſ. 23. as to ſtamps on ſea aſſurances, add here the words "*or mark*;" which alſo occurs in the ſubſequent part of the recited act. And the general conſolidating act 27 Geo. 3. c. 13. ſ. 46. mentioned in the text, including all former acts, the 30 Geo. 2. c. 19. ſ. 27. as to deeds, newſpapers, almanacks, and licences for wine, ſpirituous liquors, and ale, beer, &c., the 31 Geo. 3. c. 21. ſ. 5. as to game certificates, and the 34 Geo. 3. c. 14. as to indentures of clerkſhip to attornies, &c. add the words "*ſeal* or *mark*."

(*c*) The ſtatutes 31 Geo. 3. c. 25. ſ. 29. and 35 Geo. 3. c. 63. ſ. 23. abovementioned, add here the words "upon any vellum, parchment, or paper."

(*d*) The ſtats. 31 Geo. 3. c. 25. ſ. 29. and 39 Geo. 3. c. 107. ſ. 25. (which latter extends to ſtamps on bills of exchange and promiſſory notes for ſmall ſums of money) add the words "*or expoſe to ſale*," and ſo does the ſtat. 23 Geo. 3. c. 58. ſ. 11. which extends to all prior acts.

(*e*) The ſtat. 41 Geo. 3. c. 86. ſ. 16. granting additional ſtamp duties on cards and dice, probates of wills or letters of adminiſtration, certain indentures, leaſes, bonds, and other deeds, and ale licences, omits the words "*or fraudulently*."

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" or allowed to be uſed by this act, with intent to defraud " his Majeſty of the ſaid duties (*a*); then every perſon ſo " offending, and being thereof lawfully convicted, ſhall be " adjudged a felon, &c. without benefit of clergy."

10 Ann. c. 19. ſ. 97. *On ſilks, callicoes, linens, and ſtuffs.*

By the ſtat. 10 Ann. c. 19. ſ. 97. which directs the commiſſioners of the Cuſtoms to provide certain ſeals or ſtamps for imported linens, and the commiſſioners for managing the duties on ſilks, callicoes, linens, and ſtuffs, to be printed or dyed, &c. in Great Britain, to provide certain other ſeals or ſtamps for marking the ſame, enacts, that " if any perſon " ſhall counterfeit or forge any ſtamp or ſeal to reſemble " any ſtamp or ſeal which ſhall be provided or made in pur- " ſuance of this act, or ſhall counterfeit or reſemble the " impreſſion of the ſame upon any of the commodities " chargeable by this act, thereby to defraud her Majeſty, &c. " of any of the ſaid duties hereby granted; every perſon ſo " offending, being thereof convicted in due form of law, ſhall " be adjudged a felon without benefit of clergy: And if any " perſon or perſons ſhall during the continuance of this act ſell " any printed, painted, ſtained, or dyed ſilks, callicoes, linens, " or other ſtuffs as aforeſaid with a counterfeit ſtamp there- " on, knowing the ſame to be counterfeited, with an intent to " defraud her Majeſty, &c. every ſuch offender, their aiders, " abettors, and aſſiſtants (being duly convicted as aforeſaid) " ſhall for every ſuch offence forfeit to her Majeſty, &c. " 100l. and ſhall be adjudged to ſtand in the pillory in ſome " public place for two hours."

§ 17. 12 Geo. 3. c. 48.

Another general proviſion in regard to offences againſt the ſtamp laws is in the ſtat. 12 Geo. 3. c. 48. for the more effectual prevention of frauds in reſpect of ſtamp duties granted by ſeveral acts, which enacts, " That if any perſon " or perſons, at any time after the firſt of Auguſt 1772, " ſhall write or engroſs, or cauſe to be written or engroſſed, " either the whole, or any part of any writ, mandate, bond,

Writing or engroſſing any writ, bond, &c. or other writing, matter, or thing

(*a*) The ſtat. 41 Geo. 3. c. 86. ſ. 16. laſt mentioned, adds here the words (as applicable to the ſubject-matter,) " or ſhall counterfeit or forge, or cauſe to " be counterfeited or forged, any mark or name provided by the commiſſioners " under this act for the wrapping or incloſing any dice, or making any part of, " or being affixed to ſuch wrapper."

" affidavit,

" affidavit, or other writing, matter, or thing whatſoever, in
" reſpect whereof any duty is or ſhall be payable by any act
" or acts made, or to be made, in that behalf, on the whole,
" or any part of any piece of vellum, parchment, or paper
" whereon there ſhall have been before written any other
" writ, bond, mandate, affidavit, or other matter, or thing,
" in reſpect whereof any duty was or ſhall be payable as
" aforeſaid, before ſuch vellum, parchment, or paper ſhall
" have been again marked or ſtamped according to the ſaid
" acts; or ſhall fraudulently eraſe or ſcrape out, or cauſe
" to be eraſed or ſcraped out, the name or names of any
" perſon or perſons, or any ſum, date, or other thing, writ-
" ten in ſuch writ, mandate, affidavit, bond, or other writ-
" ing, matter or thing as aforeſaid; or fraudulently cut,
" tear, or get off, any mark or ſtamp, in reſpect whereof, or
" whereby, any duties are or ſhall be payable, or denoted
" to be paid or payable as aforeſaid, from any piece of vel-
" lum, parchment, paper, playing cards, outſide paper of
" any parcel or pack of playing cards, or any part thereof;
" with intent to uſe ſuch ſtamp or mark for any other
" writing, matter, or thing, in reſpect whereof any ſuch
" duty is or ſhall be payable, or denoted to be paid or pay-
" able as aforeſaid; then, ſo often, and in every ſuch caſe,
" every perſon ſo offending in any of the particulars before-
" mentioned, and every perſon knowingly and wilfully aid-
" ing, abetting, or aſſiſting any perſon or perſons to commit
" any ſuch offence or offences as aforeſaid, ſhall be deemed
" and conſtrued to be guilty of felony; and, being thereof
" convicted by due courſe of law, ſhall be tranſported to
" ſome of his Majeſty's plantations beyond the ſeas for a
" term not exceeding ſeven years, according to the laws in
" force for the tranſportation of felons: And if any ſuch
" perſon or perſons ſo convicted or tranſported, ſhall volun-
" tarily eſcape or break priſon, or return from tranſportation
" before the expiration of the time for which he, ſhe, or
" they ſhall be ſo tranſported as aforeſaid, ſuch perſon or
" perſons being thereof lawfully convicted, ſhall ſuffer death
" as a felon, without benefit of clergy, and ſhall be tried
" for ſuch felony in the county where he, ſhe, or they ſhall
" be apprehended."

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whatſoever in reſpect of which any ſtamp duty is or ſhall be payable on any paper, &c whereon was written any other writ, &c. before the ſame ſhall be ſtamped again; or fraudulently eraſing, &c. and inſerting other matter, &c on the ſame ſtamp, or cutting off, &c. any ſtamp, with intent to uſe it for any other writing; or aiding and abetting therein; felony and tranſportation.

Breaking priſon, or returning from tranſportation, death.

Trial.

By

Ch. XIX. § 17. *By ſtatute. Of ſtamps.*

By ſ. 2. " If any perſon or perſons ſhall, after the 1ſt of " Auguſt 1772, commit any of the offences aforeſaid, and " afterwards, being out of priſon, diſcover one or more per- " ſons who ſhall, ſince that time, have committed any of " the offences aforeſaid, ſo as ſuch perſon or perſons diſco- " vered ſhall be convicted of ſuch offence or offences; he, " ſhe, or they, ſo diſcovering, ſhall have and be entitled to " his Majeſty's gracious pardon for all ſuch offences by him " or her committed at any time or times before ſuch diſco- " very made."

Vide Rex v. Field, 1 Leach, 426. *Pardon for offenders making diſcovery of others.*

But any fraudulent uſing of a legal ſtamp, which many of the above-mentioned offences may be deemed to be, is made capital by ſubſequent ſtatutes, the 23 Geo. 3. c. 58. ſ. 11. and 27 Geo. 3. c. 13. ſ. 46. in the terms before expreſſed, which refer to all prior ſtamp acts.

Ante, 887.

§ 18. *Stamps on plate, &c,* Ante, 188, *&c.*

With reſpect to the forging and counterfeiting, or tranſpoſing of ſtamps on gold and ſilver plate, &c. the marks on which have been before adverted to in treating of offences relating to bullion, the ſtat. 12 Geo. 2. c. 26. ſ. 8. firſt made the offences puniſhable by a forfeiture of 100l., or in default of payment by impriſonment. But the ſtat. 31 Geo. 2. c. 32. ſ. 14. reciting that the puniſhment preſcribed by the former ſtatute had not been found ſufficient to deter offenders, repeals the former proviſion, and enacts (ſ. 15.)

31 Geo. 2. c. 32. ſ. 15.

" That if any perſon whatſoever, after the 5th of July 1758, " ſhall caſt, forge, or counterfeit, or cauſe or procure to be " caſt, forged, or counterfeited, any mark or ſtamp uſed, or " to be uſed for making gold or ſilver plate, in purſuance " of the ſaid act or of any other act or acts of parliament " now in force, by the company of Goldſmiths in London, " or by the wardens, or aſſayer or aſſayers, at York, Exeter, " Briſtol, Cheſter, Norwich, or Newcaſtle-upon-Tyne, or " by any maker or worker of gold or ſilver plate, or any or " either of them; or ſhall caſt, forge, or counterfeit, or " cauſe or procure to be caſt, forged, or counterfeited, any " mark, ſtamp, or impreſſion, in imitation of, or to reſemble " any mark, ſtamp, or impreſſion, made or to be made with " any mark or ſtamp, uſed or to be uſed as aforeſaid, by the " ſaid company of Goldſmiths in London, or by the ſaid

" wardens, or aſſayer or aſſayers, or by any maker or worker " of gold or ſilver plate, or any or either of them; or ſhall " mark or ſtamp, or cauſe or procure to be marked or " ſtamped, any wrought plate of gold or ſilver, or any wares " of braſs, or other baſe metal ſilvered or gilt over, and re- " ſembling plate of gold or ſilver, with any mark or ſtamp, " which hath been or ſhall be forged or counterfeited, at " any time either before, on, or after the ſaid 5th day of " July, in imitation of, or to reſemble any mark or ſtamp " uſed, or to be uſed as aforeſaid, by the ſaid company of " Goldſmiths in London, or by the ſaid wardens, or aſſayer " or aſſayers, or by any maker or worker of gold or " ſilver plate, or any or either of them; or ſhall tranſpoſe " or remove, or cauſe or procure to be tranſpoſed or re- " moved from one piece of wrought plate to another, or to " any veſſel of ſuch baſe metal as aforeſaid, any mark, ſtamp, " or impreſſion, made or to be made by or with any mark " or ſtamp uſed or to be uſed as aforeſaid by the ſaid com- " pany of Goldſmiths in London, or by the ſaid wardens, " or aſſayer or aſſayers, or by any maker or worker of gold " or ſilver plate, or any or either of them; or ſhall ſell, " exchange, or expoſe to ſale, or export out of this king- " dom, any wrought plate of gold or ſilver, or any veſſel of " ſuch baſe metal as aforeſaid, with any ſuch forged or " counterfeit mark, ſtamp, or impreſſion thereon, or any " mark, ſtamp, or impreſſion, which hath been or ſhall " be tranſpoſed or removed from any other piece of " plate, at any time either before, on, or after the ſaid 5th " of July; knowing ſuch mark, ſtamp, or impreſſion to be " forged, counterfeited, or tranſpoſed, or removed as afore- " ſaid; or ſhall wilfully and (*a*) knowingly have, or be " poſſeſſed of any mark, or ſtamp, which hath been or ſhall " be forged or counterfeited, (*b*) at any time, either before, " on, or after the ſaid 5th day of July, (*b*) in imitation of, " or to reſemble any mark or ſtamp uſed, or to be uſed as " aforeſaid, by the ſaid company of Goldſmiths in London, " or by the ſaid wardens, or aſſayer or aſſayers, or by any " maker or worker of gold or ſilver plate, or any or either

(*a*) The ſtat. 24 Geo. 3. ſt. 2. c 53. ſ. 16. and 38 Geo. 3. c. 69. ſ. 7. have the word *or* inſtead of *and*, and the relative words between theſe letters (*b b*) are omitted.

" of

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" of them; every ſuch perſon offending in any, each, or " either of the caſes aforeſaid, being thereof lawfully con- " victed, ſhall be adjudged guilty of felony, &c. without " benefit of clergy."

24 Geo. 3. ſt. 2. c. 53. ſ. 16.

The ſame proviſions are re-enacted with reſpect to the duty mark of the king's head impoſed by the ſtat. 24 Geo. 3. ſt. 2. c. 53. ſ. 16. including ſuch mark impoſed by the company of Goldſmiths in Edinburgh as well as London, and by the Birmingham or Sheffield company, as well as by the wardens and aſſayers at York, &c. and referring to the 1ſt of December 1784 inſtead of the 5th of July 1758. Then

38 Geo 3. c. 69. *Vide* ante, p. 192.

the ſtat. 38 Geo. 3. c. 69. by which *gold wares* were allowed to be manufactured at a lower ſtandard than was before allowed, viz. at the ſtandard of 18 inſtead of 22 carats in a pound troy, enacts, ſ. 7. that from and after the 1ſt of October 1798 " if any perſon ſhall forge, caſt, or counterfeit, " or cauſe or procure to be forged, &c. the mark or ſtamp " uſed or directed to be uſed *in purſuance of this act* for the " marking or ſtamping of *gold plate* by the company of Gold- " ſmiths in London or Edinburgh, or the Birmingham or " Sheffield company, or by the wardens, or aſſayer or aſſay- " ers at York, Exeter, Briſtol, Cheſter, Norwich, or New- " caſtle-upon-Tyne, or any or either of them," &c. And then it follows verbatim the proviſions of the former acts, excepting only that it does not extend as they do in general terms to the *makers and workers* of gold plate, as well as to the companies and aſſayers before mentioned: and alſo that it varies the deſcription of the wares therein named to " any " *wrought plate of gold*, or any *wares of ſilver, braſs, or other* " *metal gilt over and reſembling plate of gold.*" And then, inſtead of making the offences capital, it concludes, that " every ſuch perſon offending in any ſuch or either of the " caſes aforeſaid, being thereof lawfully convicted, ſhall be " adjudged guilty of felony, and ſhall be tranſported for " ſeven years."

Vide note (*a*) in the laſt page.

It is ſingular that when this ſubject was under the review of the Legiſlature, and the puniſhment for the offences under this act limited to tranſportation, offenders ejuſdem generis under the former act ſhould be left ſubjected to capital puniſhment.

The

The following caſes have occurred on the conſtruction of the ſeveral ſtamp acts.

§ 19. *Conſtruction of the ſtamp acts.*

Holland Palmer was indicted on the 23 Geo. 3. c. 49. ſ. 20. which enacts, "that if any perſon ſhall forge or "counterfeit, or procure, &c. any ſtamp or mark directed "or allowed to be uſed by the act, for the purpoſe of de-"noting the duties aforeſaid (therein mentioned) with in-"tent to defraud his Majeſty; or ſhall fraudulently uſe any "of the ſaid ſtamps or marks with the like intent; or ſhall "utter, vend, ſell, or expoſe to ſale *any paper liable to the "ſaid duties* (*a*) with any counterfeit mark or impreſſion "thereon, knowing, &c." he ſhall be guilty of felony without benefit of clergy.

Palmer's caſe, O. B. Dec. 1784, MS. Gould J. (1 Leach, 391. S. C.)

Indictment for uttering, &c. ſo many pieces of paper liable to the duty of 2*d.* (i. e. on receipts) *with a counterfeit impreſſion thereon, held well; for it follows the deſcription in the ſtat.* 23 Geo. 3. c. 49. ſ. 20. *and means ſuch pieces of paper as are deſtined and prepared for receipts by having counterfeit ſtamps. Semble alſo ſufficient if the indictment omit the words,* "liable to the ſaid duty," &c.

The firſt count, after ſtating that a certain ſtamp was provided by the ſtatute for ſtamping every piece of paper upon which any receipt, &c. upon the payment of money amounting to 2 l. &c. was written with a ſtamp duty of 2 d. &c. ſtated, that the priſoner intending to defraud the King of the duty on, &c. "unlawfully, fraudulently, and feloniouſly did utter and expoſe for ſale to H. G. 1000 pieces of paper *liable to the ſaid duty of* 2 *d.* with a counterfeit impreſſion upon each and every one of the ſaid pieces of paper reſembling the impreſſion of the ſaid ſtamp then and there uſed, according to the form of the ſtatute, &c. he the defendant at the ſaid time of uttering, &c. well knowing the ſaid impreſſion on the ſaid pieces of paper ſo by him uttered, &c. to be counterfeited; againſt the form of the ſtatute; &c."

The 2d count was like the firſt, except that the words, *liable to the ſaid duty of* 2 *d.* were left out.

The priſoner being found guilty, a queſtion was reſerved for the opinion of the Judges, whether the indictment were ſufficient under the ſtatute? Ten Judges who met in Hilary term 1785 were all of opinion that the conviction was proper: and Gould J. who afterwards delivered their unanimous opinion at the O. B. in the February ſeſſions following, ſaid that the difficulty aroſe from the penning of the act of

(*a*) The ſtat. 30 Geo. 2 c. 19. ſ. 27. and 32 Geo. 2. c. 25. ſ. 8. requiring ſtamps on affidavits, &c. have the ſame words.

parliament,

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parliament, and not from the indictment, which ſeemed to be properly drawn. The objection was founded on the ſuppoſed inaccuracy of the ſentence, "*paper liable to the* "*duties*," which in this caſe the indictment had properly and neceſſarily applied to the particular duty in queſtion, namely, the duty of 2d. on receipts. It had been aſked what was meant by *paper liable to the duties;* and how could one piece of paper be ſaid to be liable to any of the duties more than another? But that an attentive conſideration of the act in queſtion, together with a ſubſequent ſtatute, 24 Geo. 3. c. 7. in pari materiâ would help to make it clear: and that from a collection of paſſages in the two acts it would appear that thoſe words were not to be taken in the large and abſurd ſenſe of all the pieces of paper on which receipts and the other inſtruments mentioned in the 23 Geo. 3. might be written; but ſuch pieces as were deſtined or prepared for thoſe uſes: if genuine, then ſuch as by the 14th ſect. were ordered to be brought to the office to be ſtamped before they were written upon: if falſe, then ſuch pieces of paper as having ſtamps reſembling the true ones upon them purported to be papers duly ſtamped, and as ſuch liable to the ſaid duties. That it was to be obſerved, that ſection 14th of 23 Geo. 3. c. 7. expreſsly required that the papers on which the inſtruments were to be written ſhould be firſt duly ſtamped, and the ſtat. 24 Geo. 3. c. 7. made the writing of the inſtrument upon it penal (by a forfeiture of 5 l.) if it were not ſo, or unleſs a ſtamp reſembling the true one appeared upon it; (a moſt equitable exemption if the party were innocent.) When that deception appeared upon the face of the paper, the parties giving and taking it (being innocent) were perſuaded that it was duly ſtamped; and if afterwards the fraud were detected, every one muſt ſay that the paper being prepared and deſtined for a receipt to be written upon it, was liable to the duty ſignified by the counterfeit mark, and ought to have been ſtamped accordingly. It appeared to the Judges therefore that the words "paper liable to the "ſaid duties" were to be applied according to the ſubject matter to ſuch paper which from the counterfeit mark upon it appeared to be prepared to be uſed as if the mark were genuine for a receipt, and conſequently was liable to the duty.

24 Geo. 3. c. 7.

It

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It alſo ſeemed to ſome of the Judges on the conference in the above caſe, that the ſecond count which omits the words "liable to the ſaid duties," was ſufficient; for it was a charge of fraudulently uttering, &c. paper with a counterfeit impreſſion reſembling the ſaid ſtamps uſed in purſuance of the ſtatute, knowing, &c.; and this in ſubſtance was a charge of its being paper denoted by the ſaid impreſſion to be deſtined for writing receipts, and as ſuch being paper liable to that duty.

Hall and Crutchfield were indicted for forging a ſtamp on foreign muſlins printed, &c. here, with intent to defraud the King of the duty. Crutchfield being convicted, judgment was reſpited on two objections taken by his counſel; 1. That the offence was originally created by 25 Geo. 3. c. 72. ſ. 17. by which the duties for ſecuring of which the ſtamps were provided were impoſed. That by 27 Geo. 3. c. 13. ſ. 35. all the former duties are repealed except duties due and penalties and forfeitures incurred at the time of paſſing that act: and therefore it was argued that all penalties were annihilated unleſs re-enacted. That this as well as all preceding ſtatutes took a diſtinction between *duties of Exciſe* and duties *under the management of the commiſſioners of Exciſe*; according to what was obſerved by Mr. Juſtice Aſhhurſt in Rex v. The Juſtices of Surry, 2 Term Rep. 504. That ſection 38. of the latter ſtatute ſtates that "all pains, "penalties, fines, and forfeitures of any nature or kind "whatſoever, as well pains of death as others, for any "offence in force before 10th May 1787, made for ſecuring "the Revenue of Exciſe or other duties under the manage-"ment of the commiſſioners of Exciſe, &c. ſhall extend to "and be applied for and in reſpect of the ſeveral *duties of* "*Exciſe*, and allowances, bounties, and drawbacks of duties "of Exciſe thereby charged and allowed (*a*)," &c. That therefore thoſe penalties and pains of death being re-enacted only ſo far as they relate to *duties of Exciſe* and not to duties or ſums *under the management of the commiſſioners of Exciſe*, (which was the caſe with reſpect to the duty in queſtion,) they could not be revived by conſtruction, but being ſo highly

Hall and Crutchfield's caſe, O. B. 1795, MS. Buller J. and MS. Jud. *The ſtat.* 27 G. 3. c. 13. ſ. 35. *repealing former duties on foreign muſlin printed here, and enacting others in their ſtead; and providing by* ſ. 38. *that all pains, penalties, fines, and forfeitures, as well of death, as others, for any offence in breach of former acts made for ſecuring the revenue of* exciſe *or* other duties under the management of the commiſſioners of exciſe, *ſhould extend to the ſeveral* duties of exciſe, *thereby charged; re-enacts the penalty of forging the ſtamps on ſuch foreign muſlin, printed here: though the duty thereon is not denominated a* duty of exciſe, *but a duty* under the management of the commiſſioners of exciſe. *The inſtrument ſtatting the duty*

(*a*) See alſo ſ. 46. before-referred to, *ante*, 27.

penal

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penal muſt be ſpecially re-enacted. 2. That the indictment did not purſue the words of the ſtatute. The words of the 25 Geo. 3. c. 72. ſ. 17. are, "if any perſon ſhall forge, &c. any "ſtamp to reſemble any ſtamp provided to denote the charg- "ing of the duties *on* the ſaid muſlins," &c. The 2d clauſe of the ſtatute which impoſes the duties ſays, "*for and upon* all "muſlins," &c. The ſt. 27 Geo. 3. which repeals the former duties and impoſes others, has in ſect. 36. theſe words; "there ſhall be raiſed *upon* the goods mentioned in the "ſchedule," &c. The ſchedule itſelf ſays *for* every yard of foreign muſlin, &c.; whereas the indictment ſtates the intent to defraud the King of certain duties chargeable *for, on, and in reſpect of* foreign muſlin; and that the priſoner counterfeited a ſtamp to denote the payment of duties *for, on, and in reſpect of, &c.* which it was contended was a variance from the words creating the offence; and recites the words by which the duty is charged erroneouſly; for though the words uſed in the indictment are to be found in the 36th ſection of 27 Geo. 3. they refer only to drawbacks of duties impoſed, and not to the impoſition of the duties themſelves.

to be chargeable for, on, and in reſpect of foreign muſlin, &c. is ſufficient; though the words of the ſtatute impoſing the duty are "for and upon," in ſome clauſes "for," in others "on," in others "upon."

In Eaſter term 1795, ten Judges preſent, all over-ruled the objections, and held the conviction proper. Eyre C. J. thought that the naming of *duties of Exciſe* and *duties under the management of the commiſſioners of Exciſe*, was tautology. But all held it clear, that the expreſſions were uſed as ſynonimous in this act; adverting to ſchedule F, in which the duties on muſlins are denominated "duties of Exciſe." The other objection was not thought worth urging.

Vide R. v. Baxter, 5 T. Rep. 83. and 2 Hawk. ch. 25. ſ. 102.

5. *Official Papers, Securities, and Documents.*

§ 20. 39 Eliz. c. 17. ſ. 3. *Teſtimonials of ſolaiers and mariners.*

By ſtat. 39 Eliz. c. 17. ſ. 3. "Every idle and wandering "ſoldier or mariner who coming from his captain from the "ſeas or from beyond the ſeas ſhall not have a teſtimonial "under the hand of ſome one juſtice of the peace of or near "the place where he landed, ſetting down therein the "place and time when and where he landed, and the place "of his dwelling or birth unto which he is to paſs as afore- "ſaid, (referring to ſ. 2.) and a convenient time therein "limited for his paſſage:" "and alſo as well every ſuch "idle

" idle and wandering ſoldier or mariner, as every other idle " perſon wandering as ſoldier or mariner, who ſhall forge or " counterfeit any ſuch teſtimonial, or have with him or " them any ſuch teſtimonial forged or counterfeited as " aforeſaid, knowing the ſame to be counterfeited or forged; " Every ſuch act or acts to be felony, without benefit of " clergy."

Ch. XIX. § 20. *By ſtatute. Of teſtimonials of ſoldiers, &c.*

By ſ. 2. the juſtices of aſſize, of gaol delivery, and of the peace, are directed *to execute* the offenders convicted before them, except ſome honeſt perſon valued at the laſt ſubſidy to 10l. in goods, or 40s. in lands, or elſe ſome honeſt freeholder ſhall agree to take the felon into his ſervice for a year in the manner there mentioned.

Vide tit. *Vagrancy.*

§ 21.

The ſtat 2 & 3 Ann. c. 4. " for the public regiſtering of " all deeds, conveyances, and wills of any honors, manors, " lands, tenements, or hereditaments within the Weſt " Riding of the county of York, after the 29th of Septem- " ber 1704," directs a memorial of all ſuch to be regiſtered in a certain manner at Wakefield, and that the regiſtrar ſhall indorſe a certificate of ſuch regiſtry on every ſuch deed, &c. Then by ſ. 19. " If any perſon or perſons ſhall forge or coun- " terfeit any ſuch memorial or certificate as are therein " before mentioned and directed, and be thereof lawfully " convicted, ſuch perſon or perſons ſhall incur and be liable " to ſuch pains and penalties as by the ſtat. 5 Eliz. c. 14. " are impoſed upon perſons for forging or publiſhing of " falſe deeds, &c. whereby the freehold or inheritance of " any perſon in lands, &c. may be moleſted," &c.

2 & 3 Ann. c. 4. *Forging memorial or certificate of deeds or wills of land, &c. regiſtered in the W. R. of Yorkſhire, ſubjected to pains and penalties of* 5 Eliz. c. 14. *poſt.*

The ſtat. 5 Ann. c. 18. directs that all bargains and ſales of any manors, lands, tenements and hereditaments within the Weſt Riding of the county of York ſhall be regiſtered at Wakefield, and indorſed by the regiſtrar; that the inrolment of every ſuch deed ſhall be deemed a memorial purſuant to the laſt-mentioned act; and by ſ. 4. no judgment, ſtatute, or recognizance ſhall bind any manors, lands, &c. but only from the time a memorial thereof ſhall be regiſtered in the office. Then ſ. 8. ſubjects to the ſame puniſhment as the former act " any perſon or perſons who ſhall forge " or counterfeit any entry of the acknowledgment of any

Extended to bargains and ſales by 5 Ann. c. 18.

Ch. XIX. § 21. *By ſtatute. Of regiſters in Yorkſhire.*

" bargainer in any ſuch bargain and ſale as aforeſaid, or any " ſuch memorial, certificate, or indorſement as are therein " mentioned or directed, being thereof lawfully con- " victed."

8 Geo. 2. c. 6. *North Riding.*

The ſtat. 8 Geo. 2. c. 6. ſ. 31. extends the proviſions of both ſtatutes to the North Riding of the ſame county.

7 Ann. c. 20. *Middleſex.*

And the ſtat. 7 Ann. c. 20. which directs the like regiſtry of deeds, conveyances, and wills, and other incumbrances affecting honors, manors, lands, &c. in the county of Middleſex, as in ſtat. 2 & 3 Ann., and directs certificates to be indorſed on ſuch memorials, and on the deeds, &c. regiſtered, by ſ. 15. inflicts the like puniſhment on perſons who ſhall " forge or counterfeit any entry of the acknow- " ledgment of any ſuch memorial, certificate, or indorſe- " ment as is therein mentioned or directed, being thereof " lawfully convicted."

§ 22. 12 Geo. 1. c. 32. ſ. 9. *Documents relating to the money of ſuitors in Chancery.*

By the act for better ſecuring the money of the ſuitors in Chancery, lodged in the Bank, or directed to be laid out in government or other ſecurities there mentioned, (ſ. 9.) " If " any perſon or perſons forge or counterfeit, or procure to be " forged or counterfeited, or willingly act or aſſiſt in the forg- " ing or counterfeiting the name or hand of the ſaid Accomp- " tant-General, (i. e. of the court of Chancery,) the ſaid re- " giſter, the ſaid clerk of the Report Office, or any of the " caſhiers of the ſaid governor and company of the Bank of " England, to any certificate, report, entry, indorſement, de- " claration of truſt, note, direction, authority, inſtrument, or " writing whatſoever, for or in order to the receiving or ob- " taining any the money or effects of any of the ſuitors of the " ſaid court of Chancery, or ſhall forge, or counterfeit, or " procure, &c. or wilfully act or aſſiſt in forging, &c. any cer- " tificate, report, &c. (ut ſupra) made by ſuch Accomptant- " General, regiſter, clerk of the report-office, or any of the " caſhiers of the ſaid governor, &c.; or ſhall utter or pub- " liſh any ſuch knowing the ſame to be forged or counter- " feited, with intent to defraud any perſon whatſoever; " every ſuch offender being thereof lawfully convicted ſhall " be adjudged guilty of felony without benefit of clergy."

Ch XIX. § 22. *By ſtatute. Of documents of ſuitors in Chancery.*

James Gibſon was indicted on the above ſtatute for forging a writing purporting to be *an office copy of a report of the Accomptant General* of money being paid into the Bank purſuant to an order of Chancery, and alſo *an office copy of a certificate of one of the caſhiers of the Bank* of the payment of the money into the Bank. The ſecond count was for publiſhing the ſame knowing them to be forged, with intent to defraud, &c. The third and fourth counts were the one for forging, the other for publiſhing a writing in form of a writing purporting to be *an office copy of the certificate of the Accomptant-General*, and *an office copy of the receipt of the caſhier of the Bank*. There were other counts in the indictment, of which the defendant was acquitted. The certificate and receipt were ſet out verbatim in all the counts; and the offence was laid to be done with intent to defraud William Hunt.

Gibſon's caſe, Mich. 8 Geo. 3. in the Exchequer-chamber; and tried at the O. B. 1766, cor. Lord C. B. Parker, Gould and Yates Juſts. MS. Buller J. (1 Leach, 72. S. C.)

Forging a paper writing purporting to be an office copy of a report of the Accomptant-General *of money being paid into the Bank (or as laid in another count an office copy of the* certificate of the Accomptant-General), *and alſo* an office copy *of a* certificate of one of the caſhiers of the Bank, *(or as laid in another count* an office copy of the receipt of the caſhier, *&c.) is within the ſtat.* 12 Geo. 1. c. 32. ſ. 9.

At the trial a ſpecial verdict was found, ſtating as to the 1ſt and 4th counts that divers ſums of money ſince the ſtat. 12 Geo. 1. had been paid into the Bank by the order of the court of Chancery, and that the party paying the ſame had taken from one of the caſhiers of the Bank a writing ſubſcribed with his hand, the form of which the jury found in terms. That the perſon paying the money into the Bank had carried ſuch writing to the Accomptant-General, who had thereupon made a certificate under his hand, the form of which was alſo found in terms; and that the Accomptant-General had filed the ſame and the caſhier's receipt at the report office; and that the clerk of the report office had made copies of them for the party paying the money into the Bank, and for any other perſon deſiring it; and that ſuch copies were read as evidence in Chancery of the money being paid into the Bank, and of ſuch writings ſigned by the Accomptant-General and the caſhier of the Bank being filed in the report office; *but that ſuch copy was never ſigned by the ſaid clerk of the report office, nor had the ſame any mark or ſignature to denote its being made in that office, excepting that the word* "EXAMINED" *was always ſubjoined to ſuch copy by ſome clerk in the report office.* That the clerk of the report office never delivered out any thing touching the payment of money into the Bank except ſuch office copy; but applications were frequently made at the report office to ſearch for the original

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writings ſigned by the Accomptant-General and caſhier of the Bank; and the clerk of the report office made and delivered out to any perſon deſiring it copies of all decrees, reports, orders, and writings filed in that office. The jury then found that there was a certain cauſe inſtituted in the court of Chancery, and a bill of revivor in the ſame cauſe. That Hunt was appointed receiver of the rents of the premiſes, (to compel a ſale of which the bill was brought); and that he remitted 437 l. 16 s. 7 d. to be paid into the Bank to the credit of the cauſe, and that Gibſon received it. That Gibſon forged the writing (*a*) ſet forth in the firſt count with intent to defraud Hunt, and uttered and publiſhed the ſaid writing with intent to defraud, &c. knowing the ſame to be forged; which writing was in form of an office copy made by the clerk of the report office of ſuch writings ſubſcribed with the hands of the Accountant-General and one of the caſhiers of the Bank. That at the time of forging the ſaid writing Richard Rainsford was clerk of the report office, Thomas Anguiſh accomptant-general, and Benjamin Sabberton caſhier. That the ſaid forged writing purports to be an office copy made by the ſaid R. Rainsford as ſuch clerk of the report office of a writing ſubſcribed with the hand of the ſaid Thomas Anguiſh, as accomptant-general, and alſo of a writing ſubſcribed with

(*a*) The writings in queſtion are thus ſet forth in Mr. Leach's report; "20th "of February 1764, Between Robert Lee Eſq. and Chriſtopher D'Oyley Eſq. "executors of Sir George Browne Baronet, plaintiffs, and Robert Pringle Eſq. "and others, defendants. By original and ſupplemental bills, and bills of "revivor. I do hereby certify, that purſuant to an order dated the 13th of Fe"bruary inſtant, Mr. William Hunt, the receiver, hath paid into the Bank of "England the ſum of 437 l. 13 s. 7 d. which is placed to my account as Ac"countant General, and to the credit of the cauſe of Browne againſt Pringle, in "Maſter Bennett's office; as appears by the receipt of Mr. B. Sabbarton, one of "the caſhiers of the Bank, dated the ſixteenth inſtant, hereto annexed. (Signed) "T. Anguiſh, Accountant General, London."

"London, the 16th of February 1764. Received of Mr. William Hunt, "the receiver, the ſum of 437 l. 13 s. 7 d. purſuant to an order dated 13th Feb. "inſtant, made in the cauſe of Lee againſt Pringle, which money is placed to "the account of Thomas Anguiſh Eſq. as Accountant General of the Court of "Chancery, and to the credit of the cauſe of Browne againſt Pringle, in Maſter "Bennet's office, in the books kept at the Bank for the ſuitors of the ſaid court "of Chancery. For the Governor and Co. of the Bank of England, 437 l. 13 s. "7 d. entered.——B. Sabberton."

"T. Cradwell examined.

the

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the hand of the ſaid Benjamin Sabberton as caſhier. That the money was not paid into the Bank, nor did ſuch writing ever exiſt as the ſaid forged writing purports to be an office copy of. That the forged writing was ſent to Hunt; and he believing the ſame to be a true office copy, afterwards remitted more money to Gibſon to be paid into the Bank in the ſame cauſe, which he would not have done if he had not believed the ſaid office copy to be a true one. But whether on the whole the writing ſo forged, counterfeited, atteſted, and publiſhed by the ſaid James Gibſon as aforeſaid be a writing in form of a certificate, report, entry, &c. (the words of the act) within the meaning of the ſaid act, the jurors were ignorant, and ſo prayed the advice of the Court. And if, &c.

The ſpecial verdict was argued (*a*) in the Exchequer-chamber in Mich. term 8 Geo. 3. before ten Judges, when it was contended for the proſecution (*b*) that the forged writings in queſtion were within the ſtatute, the object of which was the ſecurity of the ſuitor's money. That every authentic certificate was comprehended within it, to which the hand of the Accomptant-General was neceſſary. And it was intended that the different offices ſhould be a check upon one another, and in this caſe the report office was a check upon the Accomptant-General. The act conſidered the report office as the public repoſitory where all theſe documents were depoſited, and the only evidence the party had was the copy of the particular document lodged there: and therefore in the firſt inſtance it was felony to forge the name or hand of the Accomptant-General with an intention to receive the ſuitor's money. The next clauſe was ſtill more penal, upon which the indictment was founded. 1. As to the nature of *an office copy*. In every court of juſtice there is a proper officer appointed, in whom the court confides, to make authentic copies of its proceedings, and the originals

(*a*) As there is no account in the note of the particular grounds on which the caſe was decided, I have thought it neceſſary to ſtate the arguments of the counſel at ſome length.

(*b*) Some trifling informalities were remarked in the drawing up of the ſpecial verdict, which were reſerved for future conſideration, if they ſhould be found weighty enough to raiſe a doubt.

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are depoſited with him for the benefit of the public; and ſuch office copies are equivalent to the records themſelves of the court. The clerk of the report office is the confidential officer of the court of Chancery, and copies under his hand are read in the ſame cauſe without any further evidence; and this is a form of an office copy made under the hand of that officer, and in the ſame cauſe then before the court. The jury have found that Hunt was the receiver, and that Gibſon received the money for which this certificate was forged, and that it was in the form of a certificate. 2. As to the nature of the priſoner's offence. He is found guilty of forging and publiſhing theſe authenticated office copies with an intention to defraud the receiver: and it is found that Hunt, confiding in this forged office copy, remitted further ſums, which he would not otherwiſe have done: and it is clear that this was done to defraud. It may be aſked *cui bono* could the priſoner forge a copy of that of which there was no original? But that is anſwered by ſaying, that every forgery is intended to carry the appearance of a true tranſaction in itſelf, while it carries evidence of facts which are falſe; and it is no alleviation of the offence that the party has forged that which could not be true; for the criminal intent which is found was to defraud and impoſe upon Hunt. 3. The forgery is within the words of the act; for it is *a writing in form of a writing made by the clerk of the report office*, as the jury have found. The Legiſlature meant to include every kind of writing, and leave the criminality of the intention to the determination of the jury. But, 4. It is as much within the meaning as the words of the act, which meant to take in all documents whatſoever, and to protect the ſuitor's money as well before as after it is brought into court; and all the documents are repeated in the penal clauſe. The only way of deceiving was to ſend an *office copy*, as the defendant did. This was ſuitor's money, and therefore expreſsly within the act: though it would have been ſufficient if done to defraud any perſon. 5. Though the ſpecial verdict finds that any perſon may have an office copy, that does not weaken the authority of the inſtrument. Nor, 6. does the circumſtance that it has no office mark, except the word "*examined*," though it might weigh as a reaſon with the Judge who preſides in Chancery to direct that

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that there ſhould be ſome other ſignature. But hitherto there never has been any other mark, and the Court has confided in its officer, marking it as *examined:* and the copy in queſtion might have been read without any diſpute in any cauſe, and in the particular cauſe was equal (if genuine) to the original itſelf, without proving it to be an examined copy, which is only neceſſary where the copy is produced in other cauſes.

For the priſoner two queſtions were made; 1. Whether this were ſuch a forgery as is within the ſtatute. 2. If the finding of the jury were ſufficient. 1. The difference of the papers mentioned in the 1ſt and 4th counts is, that in the firſt count the paper is called "an office copy *of a report* "*of the Accomptant-General,*" and "an office copy *of the* "*certificate of the caſhier,*" and in the fourth count it is called "an office copy *of the certificate of the Accomp-* "*tant-General,*" and "an office copy *of the receipt* "*of the caſhier.*" And the argument for the Crown is, that the words "*inſtrument or other writing*" can mean nothing unleſs they comprehend the preſent writing. But there are ſeveral writings mentioned in the act, which are not recapitulated in the penal clauſe, ſuch as the *intratur*, the *authority*, and the *counter-ſigning by the Maſter*. The act could not mean the forging the office copy of any writing whatever, but only a writing in form of ſome original inſtrument ſuppoſed to be made by one of the officers named in the act, and which (if genuine) would be authentic under the proviſion of the act itſelf: for no practice of the court of Chancery in allowing or rejecting an office copy to be evidence can affect the queſtion; for that would be to make the expoſition of a penal ſtatute depend upon matters collateral, and become uncertain from variable rules at the diſcretion of the court of Chancery. The object of the Legiſlature was to protect the ſuitors againſt fraud; which would have been fruſtrated by making an office copy evidence of its contents. All the inſtruments enumerated in the penal clauſe are provided for, and their ſeveral officers aſſigned them in the preceding parts of the act; but there is no mention of *an office copy* of any kind. An office copy bears no marks of authenticity; it is ſigned by no body, and procureable by any body upon aſking for it and paying the fees:

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but the original which is depoſited in a certain place is ſigned by the proper officer, and is authentic evidence; and therefore it cannot be ſuppoſed that the court of Chancery would rely upon ſuch a copy which had no evidence of authenticity. It is ſaid the words "*writing in form of a writing*" have a general ſignification; but that would extend the clauſe beyond what it is poſſible the Legiſlature could mean; for then every private inſtrument of theſe officers fabricated with intent to defraud would be within the penal clauſe. Neither can it extend even to things ſuppoſed to be made by them virtute officii; for if ſo, a forged copy of a *decree* made with a deſign to defraud would be within the act; which could not be, as it would have no relation to the deſign for which the act was framed, which only meant to prevent frauds in obtaining the money of ſuitors out of court. As if one forged a ſuppoſed office copy of a decree upon which he was to receive 1000l., upon the credit of which he borrowed money; this could not come within the act; and yet it would be "*a writing* in form of a writing," ſigned by the proper officer, with intent to defraud. To forge or counterfeit imports in its nature a ſimilitude to ſomething that exiſts, a reſemblance of or deſign to reſemble the hand of ſome other perſon whoſe name or character it bears: but this bears no name, no ſignature, no mark to denote its being any writing made by Mr. Rainsford, the clerk of the report office, rather than of any of his under clerks, or indeed to have been made in that office at all. It is notorious that none of theſe copies are even ſuppoſed to be made by the ſuperior officer, and ſo the verdict ſtates. It is not ſaid in the indictment that this was ſuitors' money, or that Hunt was the receiver, or that there was any cauſe depending, or any order to pay the money into court. 2dly, As to the finding of the jury: It was neceſſary that there ſhould be a cauſe depending, and an order for the payment of the money; but no ſuch order is found by the verdict; and without it the caſhier of the Bank could not receive, nor the Accomptant General take any account; and there can be no intendment that there was ſuch an order. Plummer's caſe, Kel. 111. The verdict only ſtates, that Gibſon having the money in his hands (received honeſtly and without fraud), this writing was forged with intent to defraud

defraud Hunt, and that the money was never paid into the Bank, and that such writing (of which this is a supposed copy) never existed. It could be no fraud not to have paid the money without an order, and nothing is found from whence any intention of fraud can be inferred. The money, being lawfully received, was lawfully retained by Gibson, because he had no authority to pay it into the Bank without an order from the court. Therefore, if there were an intention to defraud by means of this paper, however criminal it might be, it is no offence within the act; for the act supposes the money to have been paid into the Bank, which this never was. Supposing Hunt had remitted the money to Gibson for another purpose, and he for the sake of retaining it, had pretended to Hunt by doing this act that he had applied it in that manner, would that have been within the act? The finding that Hunt upon the credit of this afterwards remitted more money is immaterial, for it is not even found that Gibson received it.

In reply it was observed, that the *authority* was expressly mentioned in the penal clause, and so was the *intratur*, which was no more than the entry of the name. Admitting that the object of the act was the security of the suitors' money, yet it was not only meant to secure it when paid in, but also *in transitu*, and in the hands of any person, provided it could fall under the denomination of *suitors' money*. That the admission of office copies in evidence did not depend on the practice of the court of Chancery, but was the common law of the kingdom; and therefore it was no answer to say that it would open a door to fraud. That the true question was, whether this were such an instrument as would be authentic, if made by the officer in his office, and in which he was entrusted by the court for the purpose. That admitting that the writing had not the resemblance of an *original* writing, yet it had the form and appearance of an *office copy*; and any thing that had the form and appearance of an office copy was evidence in itself. That it was not true that no person was liable to be defrauded in this case; for the receiver was deceived by it, and remitted the prisoner a further sum on the credit of it. That the indictment was founded on the last branch of the penal clause of the act, and expressly charged

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charged that the priſoner forged a paper writing purporting to be a receipt ſigned by the Accomptant-General. As to there being no order found to pay the money into court, it conſtituted part of the offence complained of; for if the priſoner, as part of the contrivance to defraud, had previouſly inſtructed counſel to move for an order, that could not have altered the law: but as the matter ſtood, it added another falſehood to the offence committed. Neither was it neceſſary to aver in the indictment that a cauſe was depending, if the caſe were within the laſt branch of the penal clauſe; for that puniſhes the act if done to defraud any perſon generally.

After the argument Lord Mansfield C. J. obſerved, that the verdict left but one queſtion to conſider, which was, whether the offence were within the act. That if they had any doubts, the Judges would appoint it to be argued again the next term; otherwiſe they would determine the matter among themſelves. Accordingly, in Hilary term following, eleven Judges met at Serjeants'-Inn, and were of opinion that the indictment and verdict were ſufficient and needed no amendment, and that the caſe of the priſoner was within the act of parliament.

(One place was vacant.)

§ 23. 4 Geo. 2. c. 18. *Mediterranean paſs.* *Vide* Report on Temporary Laws by Committee of Houſe of Commons, page 17.

In reference to the treaties between this kingdom and the Barbary powers, by which on producing a paſs in a certain form the latter agree to let Britiſh veſſels go free, the ſtat. 4 Geo. 2. c. 18. enacts, "that if any perſon or perſons "ſhall within Great Britain or Ireland, or any other his "Majeſty's dominions, or without, falſely make, forge, or "counterfeit, or cauſe or procure, &c. or wittingly or knowingly act or aſſiſt in the falſe making, &c. any paſs or "paſſes for any ſhip or ſhips whatſoever, commonly called "a Mediterranean paſs or paſſes, or ſhall counterfeit the "ſeal of the ſaid office, (i. e. of Lord High Admiral) or the "hand or hands of the Lord High Admiral of Great Britain and Ireland, or of any commiſſioner or commiſſioners for executing the ſaid office to any ſuch paſs or "paſſes; or ſhall alter or eraſe any true or authentic paſs "or paſſes iſſued or made out by the Lord High Admiral, "&c. or the commiſſioners, &c.; or ſhall utter or publiſh "as true any ſuch falſe, forged, counterfeited, altered, or "eraſed

" eraſed paſs or paſſes, knowing the ſame to be falſe, &c. " or eraſed; every ſuch perſon or perſons, being duly con- " victed of any of the offences aforeſaid in any proper court " of Great Britain, Ireland, or any of his Majeſty's Planta- " tions beyond the ſeas, where ſuch offence ſhall be com- " mitted reſpectively, ſhall be adjudged guilty of felony " without benefit of clergy."

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By ſ. 2. ſuch offences " committed in any country or " place out of Great Britain, either within or without the " dominions of his Majeſty, his heirs, &c. ſhall and may be " inquired of, tried, &c. and adjudged in any ſhire or " county of Great Britain by virtue of the King's commiſ- " ſion of oyer and terminer and gaol delivery, or before any " court of juſticiary in Scotland," &c.

Trial.

The forging or making falſe entries in marriage regiſters, or marriage licences, &c. which were puniſhable as miſdemeanors at common law, and are made capital felonies by ſtat. 26 Geo. 2. c. 33. ſ. 16. have been ſhewn before.

§ 24. *Marriage regiſter licence, &c.* 26 Geo 2. c. 33. Ante, 477. Dudley's caſe, 2 Sid. 71.

By ſtat. 31 Geo. 2. c. 10. ſ. 24. " Whoſoever willingly " and knowingly ſhall perſonate or falſely aſſume the name " or character of, or procure any other to perſonate or " falſely to aſſume the name or character of, any officer, " ſeaman, or other perſon entitled, or ſuppoſed to be enti- " tled, to any wages, pay, or other allowances of money, or " prize money, for ſervice done on board of any ſhip or " veſſel of his Majeſty, his heirs, &c.; or the executor or " adminiſtrator, wife, relation, or creditor, of any ſuch " officer or ſeaman, or other perſon, in order to receive any " wages, pay, or other allowances of money, or prize money, " due or ſuppoſed to be due or payable, for or on account of " the ſervices of any ſuch officer or ſeaman or other perſon, " as aforeſaid; or ſhall forge or counterfeit, or procure to be " forged, &c. any letter of attorney, bill, ticket, certificate, " aſſignment, laſt will, or any other power or authority " whatſoever, in order to receive any ſuch wages, &c. due " or ſuppoſed to be due to any ſuch officer, &c.;" or by ſtat. 9 Geo. 3. c. 30. ſ. 6. " if any perſon ſhall utter or " publiſh, as true, any falſe, forged, or counterfeited letter " of attorney, bill, &c. (as before) in order to receive any " wages,

§ 25. *Seamens' wills, &c.* 31 Geo. 2. c. 10. ſ. 24. *Perſonating ſeaman, &c. his executor, wife, relation, or creditor, in order to receive his wages, &c. or forging letter of attorney, &c. or other authority to receive the ſame, or uttering or publiſhing ſuch, &c. death. Vide* the next chapter, ſ. 3, 4.

Vide 32 Geo. 3. c. 33. as to the inſtruments named.

9 Geo. 3. c. 30. ſ. 6. *Uttering or publiſhing the ſame.*

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" wages, &c. due or ſuppoſed to be due to any officer or " ſeaman or other perſon, who has really ſerved or was " ſuppoſed to have ſerved, or who ſhall hereafter ſerve or " be ſuppoſed to have ſerved on board of any ſhip or veſſel " of his Majeſty, his heirs, &c. with intent to defraud any " perſon, knowing the ſame to be falſe, forged or counter- " feited;) every ſuch perſon ſo offending, being lawfully con- " victed of any ſuch offence or offences, ſhall be deemed " guilty of felony without benefit of clergy."

Moſt of theſe offences were before ſubjected to a penalty of 200l., and impriſonment till payment by ſtat. 9 & 10 W. 3. c. 41. ſ. 3.

By ſ. 5. of the laſt-mentioned act, the treaſurer, comptroller, ſurveyor, clerk of the acts, or any commiſſioner of the navy may act as juſtices of the peace in cauſing the offenders to be apprehended.

32 Geo. 3. c. 33. ſ. 23. *Extends to tickets for wages of marines as well as ſeamen.*

By ſtat. 32 Geo. 3. c. 33. ſ. 23. " If any perſon after " the 1ſt of Auguſt 1792 ſhall falſely make, forge, or coun- " terfeit, or cauſe or procure to be falſely made, forged, or " counterfeited, or willingly act and aſſiſt in the falſe mak- " ing, forging, or counterfeiting any ticket for the wages or " pay due to any petty officer or ſeaman, non-commiſſioned " officer (*a*) of marines, or marine, for his ſervices on board " any ſhip or veſſel of his Majeſty, his heirs, &c. or any " duplicate of any ſuch ticket, or any certificate of diſcharge " from any naval hoſpital of his Majeſty, his heirs, &c.; or " any remittance bill, or duplicate of remittance bill; with " intention to receive any wages, pay, or other allowances " of money, or prize money, due, or ſuppoſed to be due, " for or on account of the ſervice of any petty officer or " ſeaman, non-commiſſioned officer of marines, or marine " on board any ſhip or veſſel of his Majeſty, his heirs, &c.; " or ſhall utter or publiſh as true any ticket for the wages " or pay due to any petty officer or ſeaman, non-commiſ- " ſioned officer of marines, or marine, for his ſervice on

(*a*) By ſ. 8. of ſtat. 32 G. 3. c. 34. inferior or petty officers and ſeamen and non-commiſſioned officers of marines or marines, named in that and former acts, are to be underſtood of all the complement of a ſhip excepting ſuch as are rated admirals or flag officers and their ſecretaries, captains and lieutenants, maſters, ſecond maſters and pilots, phyſicians, ſurgeons, chaplains, boatſwains, gunners, carpenters, and purſers, captains of marines, and captain-lieutenants, lieutenants, and quarter-maſters of marines.

" board

" board any ſhip or veſſel of his Majeſty, his heirs, &c.; or " any duplicate of any ſuch ticket, or any certificate of diſ- " charge from any naval hoſpital of his Majeſty, his heirs, " &c.; or any remittance bill, or duplicate of remittance " bill; with intention to receive any wages, pay, or other " allowances of money, or prize money, due, or ſuppoſed " to be due, for or on account of the ſervice of any petty " officer or ſeaman, non-commiſſioned officer of marines, or " marine, on board of any ſhip or veſſel of his Majeſty, his " heirs, &c. knowing the ſame to be falſe, forged or coun- " terfeited; then every ſuch perſon ſo offending, being " lawfully convicted of any ſuch offence or offences, ſhall " be deemed guilty of felony without benefit of clergy."

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By ſ. 24. it is expreſsly declared, that ſo much of the ſtat. 31 Geo. 2. c. 10. as is not repealed by this act ſhall remain in force.

So much of 31 Geo. 2. c. 10. *not repealed, to remain in force.*

In further aid of theſe proviſions the ſtat. 26 Geo. 3. c. 63. has provided that no letter of attorney of any petty officer or ſeaman, or of their executors or adminiſtrators empowering any perſon to receive their wages, pay, or allowance of money of any kind for ſervice due or to grow due, ſhall be valid, unleſs made revocable; and that no letter of attorney or will of ſuch petty officer or ſeaman diſpoſing of the ſame wages, &c. ſhall be valid; unleſs (if made in actual ſervice) ſigned before and atteſted by the commanding officer of the ſhip, &c. or other perſons therein named (if made on ſhore); and certain other forms are alſo directed to be purſued. Theſe proviſions are extended to marines by ſtat. 32 Geo. 3. c. 34. which alſo directs (ſ. 2.) that no letter of attorney or order made by any petty officer, ſeaman, non-commiſſioned officer of marines, or marine, who ſhall have been diſcharged from the ſervice, and who ſhall be within ſeven miles of a port where ſeamen's wages are paid, ſhall be valid, unleſs it be ſigned before and atteſted by a clerk of the treaſurer of the navy at ſuch port, or by the inſpector of ſeamen's wills and powers of attorney. It alſo gives a certain form of diſcharge called a certificate, which the party muſt produce, or his perſon be identified, before he can receive his wages, &c. or before any his letter of attorney can be paſſed. Orders may be given by ſeamen, &c. in the

Regulations by 26 Geo. 3. c. 63.

32 Geo. 3. c. 34.

Ch. XIX. § 25. *By ſtatute. Of certificates for ſeamens' wills; or prize bills, &c.*

form preſcribed for any ſum not exceeding 7l.; and various other forms are preſcribed for different methods of paying theſe perſons; and then by ſ. 29. (32 Geo. 3. c. 34.) "if "any perſon, after the 1ſt of Auguſt 1792, ſhall falſely "make, forge, or counterfeit, or cauſe or procure to be "falſely made, &c. or willingly act and aſſiſt in the falſe "making, &c. any petition for a certificate therein-before "deſcribed or mentioned, to enable any perſon or perſons "to obtain letters of adminiſtration to any petty officer or "ſeaman, non-commiſſioned officer or private of marines, "who ſhall have ſerved on board any ſhip or veſſel of his "Majeſty, his heirs, &c. or ſhall utter or publiſh as true, "any ſuch petition, &c. or ſhall falſely make, forge, or "counterfeit, or cauſe or procure to be falſely made, &c. or "willingly act and aſſiſt in the falſe making, &c. any cer-"tificate for enabling him, her, or them to obtain probate, "or letters of adminiſtration, with the will annexed; or any "check, remittance bill, or duplicate of remittance bill, or "any certificate to the deputy paymaſter, in reſpect of "wages, prize money, and other allowances of money, not "exceeding ten pounds, herein-before ſeverally deſcribed "or mentioned, in order to receive any wages, pay, or "other allowances of money, or prize money, due or ſup-"poſed to be due for or on account of the ſervice of any "petty officer or ſeaman, non-commiſſioned officer, or pri-"vate of marines, on board any ſhip or veſſel of his Ma-"jeſty, his heirs, &c.; or ſhall utter or publiſh as true any "ſuch check, &c. in order to receive any wages, &c. due "or ſuppoſed to be due for or on account of the ſervice of "any petty officer, &c. on board, &c. knowing the ſame to "be falſe, forged, or counterfeited; then every ſuch perſon, "being lawfully convicted of any ſuch offence or offences, "ſhall be deemed guilty of felony without benefit of "clergy."

32 Geo. 3. c. 34. ſ. 29. *Perſons forging petitions for certificates to enable any perſon to obtain adminiſtration, &c. to ſeamen or marines, or any check, remittance bill, or duplicate of remittance bill, or certificate to the deputy paymaſter in order to receive the wages, &c. of ſuch ſeamen, &c. death.*

Petty officers, ſeamen, &c. attempting to receive their pay on forged certificates, or aſſiſting in forging them, to be puniſhed as in caſes of perjury.

By ſ. 30. "after the 1ſt of Auguſt 1792, if any petty "officer, or ſeaman, non-commiſſioned officer of marines, "or marine, ſhall receive his pay, or ſhall attempt to receive "the ſame, or any part thereof, upon any certificate, pur-"porting to be a certificate of ſervitude, or a certificate of "diſcharge, knowing the ſame to be forged or counterfeit-"ed,

" ed; or if any such petty officer by himself, or by employ- " ing others, shall assist in the forging or counterfeiting of " any such certificate; every such petty officer, or seaman, " non-commissioned officer of marines, or marine, being " thereof convicted, shall be punished as in cases of per- " jury."

Ch. XIX. § 25. *By statute. Of seamens' and marines' certificates, &c.*

By stat. 32 Geo. 3. c. 67. all these regulations are extended to seamen and marines serving on board ships, and residing, in Ireland.

The muster-books of the King's ships documented in the navy office, to which returns are regularly made by the several commanders of the names, &c. of their respective crews, are admitted as evidence of the persons therein named having served on board the several ships in the capacities there mentioned.

R. v. Rhodes, O. B. 1742, cor. Reynolds B. 1 Leach, 23. and R. v. Fitzgerald and Lee, ib. 20.

§ 26. *Prefines and postfines.* 32 Geo. 2. c. 14.

The stat. 32 Geo. 2. c. 14. directs the receiver of prefines at the alienation office to receive the postfine at the same time on every writ of covenant sued out for the passing of fines in C. B., and to indorse the receipt of the same thereon with his name and the mark of office. And by s. 9. " If any person or persons after the 1st day of Trinity " term 1759 shall make, forge or counterfeit, or cause or " procure to be made, &c. the mark or hand of such receiver " as aforesaid, whereby such receiver, or any other person " or persons shall or may be defrauded or suffer any loss " thereby; every person or persons convicted of such of- " fence shall be deemed guilty of felony without benefit of " clergy."

§ 27. *Franks of letters.* 24 Geo. 3. st. 2. c. 37. s. 9. *The last act altering the rates of postage* 41 G. 3. c. 7. s. 12. *incorporates all former general provisions, and this clause is repeated verbatim in the last act* 42 G. 3. c. 63. s. 14. *relating to the postage.*

By stat. 24 Geo. 3. stat. 2. c. 37. s. 9. " If any person " whatsoever shall (after the end of that session) forge or " counterfeit the hand-writing of any person whatsoever in " the superscription of any letter or packet to be sent by the " post, in order to avoid the payment of the duty of post- " age; or shall forge, counterfeit, or alter, or procure to be " forged, &c. the date upon the superscription of any such " letter or packet; or shall write and send by the post, or " cause to be written and sent by the post any letter or " packet the superscription or cover whereof shall be forged " or

Ch. XIX § 27. *By ſtatute. Of franks of letters.*

" or counterfeited, or the date upon ſuch ſuperſcription or " cover altered, in order to avoid the payment of the duty " of poſtage, knowing the ſame to be forged, counterfeited " or altered; every perſon ſo offending, and being thereof " convicted in due form of law, ſhall be deemed guilty of " felony, and ſhall be tranſported for ſeven years."

§ 28. *Exchequer bills, &c* 42 Geo. 3. c. 1. § 41.

Alſo the forging or counterfeiting of any Exchequer bill is made a capital felony by the ſeveral acts paſſed uſually every year, authorizing the iſſue of ſuch ſecurities. And by one of the laſt acts for the iſſue of Exchequer bills, which may be taken as a modern precedent for the form of the penal clauſe; " If any perſon or perſons ſhall forge or coun- " terfeit any Exchequer bill which ſhall have been made " forth by virtue of the act (42 Geo. 3. c. 1.) before the ſame " ſhall have been paid off and cancelled, or any Exchequer " bills to be renewed or made forth in purſuance of the act, " or any indorſement or writing thereupon or therein; or " tender in payment any ſuch forged or counterfeit bill, or " any Exchequer bill with ſuch counterfeit indorſement or " writing thereon; or ſhall demand to have ſuch counterfeit " bill, or any ſuch Exchequer bill with ſuch counterfeit in- " dorſement or writing thereupon or therein, exchanged for " ready money by any perſon or perſons, body or bodies po- " litic or corporate, who ſhall be obliged or required to " exchange the ſame, or by any other perſon or perſons " whatſoever, knowing the bill ſo tendered in payment or " demanded to be exchanged, or the indorſement or writing " thereupon or therein to be forged or counterfeited, and " with intent to defraud his Majeſty, his heirs, &c. or the " perſons to be appointed to pay off the ſame or any of " them, or to pay any intereſt thereon, or the perſon or " perſons, body or bodies politic or corporate who ſhall " contract to circulate or exchange the ſame, or any of " them, or any other perſon or perſons, body or bodies " politic or corporate; then every ſuch perſon or perſons " ſo offending, being thereof lawfully convicted, ſhall be " adjudged a felon without benefit of clergy."

Iriſh debentures, 42 Geo. 3. c. 58.

Alſo by ſtat. 42 Geo. 3. c. 58. ſ. 20. " If any perſon or per- " ſons ſhall forge or counterfeit, or cauſe or procure to be " forged,

" forged, &c. or shall willingly act or assist in the forging, Ch. XIX. §28.
" &c. any receipt or receipts for the whole of or any part *By statute. Of Exchequer bills, debentures, &c.*
" or parts of the said contributions, &c. (towards the loan to
" be raised by that act for the service of Ireland) either with
" or without the name or names of any person or persons
" being inserted therein as the contributor or contributors
" thereto, or payer or payers thereof, or of any part or parts
" thereof; or shall alter any number, figure, or word there-
" in; or utter or publish as true any such false, forged,
" counterfeited, or altered receipt or receipts, with intent
" to defraud the governor and company of the Bank of
" Ireland, or any body politic or corporate, or any person or
" persons whatsoever; or shall forge or counterfeit any de-
" benture or debentures, or alter any number, figure, or
" word therein; or utter or publish as true any such false,
" forged, counterfeited or altered debenture, with intent to
" defraud his Majesty, &c. or any person or persons; every
" such person or persons so forging or counterfeiting, or
" causing or procuring, &c., or willingly acting or assisting
" in the forging, counterfeiting, or altering, uttering or
" publishing as aforesaid, being thereof convicted, shall be
" guilty of felony without benefit of clergy."

By the last Lottery Act, " If any person or persons § 29.
" shall forge or counterfeit, or cause or procure to be *Lottery tickets, 42 Geo. 3. c. 54. s. 47.*
" forged, &c. or willingly act or assist in the forging, &c.
" any share or shares, or any agreement or agreements for
" any share or shares of any ticket or tickets, divided by
" virtue of this act; or alter any number, figure, word, or
" stamp therein or thereon; or shall knowingly utter, vend,
" barter, or dispose of any such forged, counterfeited, or
" altered share or shares, or agreement or agreements for
" any share or shares of any ticket or tickets, with intent to
" defraud any person or persons; all and every person and
" persons so offending and being duly thereof convicted
" shall be guilty of felony, and suffer as a felon." By former annual acts such offences were made capital.

By s. 42. of the same act, " If any person or persons shall *Forging licences, &c.*
" forge or counterfeit, or cause to be forged or counterfeit-
" ed, or assist in forging, &c. any licence authorised by this
" act; or shall fraudulently alter or cause to be altered, or

Ch. XIX. §29. *By ſtatute Of Lottery tickets, &c.*

" aſſiſt in altering any ſuch licence as ſhall be really granted " under this act; or ſhall knowingly make uſe of any ſuch " forged, counterfeited, or altered licence; ſuch perſon or " perſons ſhall for every ſuch offence forfeit 500l. (half to " the Crown and half to the informer) to be recovered by " action, &c. and ſhall alſo be ſubject to impriſonment not " exceeding ſix months, as the Court in which the offender " ſhall be convicted ſhall appoint."

§ 30. *a.* *Receipts for duties on legacies, &c.* 36 Geo. 3. c. 52.

So the ſtat. 36 Geo. 3. c. 52. for granting duties on legacies and ſhares of perſonal eſtates, which directs the commiſſioners of the ſtamps to receive the ſame, and to give papers adapted for receipts or diſcharges to the parties applying upon payment of the duties, and that no legacies liable to the duty ſhall be paid without ſuch a receipt, containing certain particulars, and the amount of the duty payable thereon, under certain penalties; and that no receipt for any legacy ſhall be available in evidence unleſs duly ſtamped; enacts,

Penalty of 500l. for altering receipts.

Sect. 39. " That if any perſon ſhall alter any word, let- " ter, figure, or number, in any aſſeſſment or receipt to be " made or given in purſuance of this act, for any of the " ſaid duties, after the ſame ſhall have been ſigned by the " officer appointed to ſign the ſame, according to the di- " rections of this act; or ſhall utter or publiſh as true any " ſuch altered aſſeſſment or receipt, with intent to defraud " his Majeſty, his heirs, &c. or any other perſon or perſons; " then and in ſuch caſe every perſon ſo altering, utter- " ing, or publiſhing as aforeſaid, ſhall forfeit and pay the " ſum of 500l."

Perſons forging ſtamps, &c. to ſuffer death.

Sect. 40. enacts, " That if any perſon ſhall counterfeit " or forge, or procure to be counterfeited or forged, any " ſtamp directed or allowed to be uſed or provided, made " or uſed, in purſuance of this act; or ſhall counterfeit or " reſemble the impreſſion of the ſame upon any vellum, " parchment, or paper, with intention to defraud his Ma- " jeſty, his heirs, &c.; or ſhall utter, vend, ſell, or expoſe " to ſale any vellum, parchment, or paper, liable to the ſaid " duty, with ſuch counterfeit impreſſion thereon, knowing " the ſame to be counterfeited; or ſhall privately or fraudu- " lently uſe any ſtamp directed or allowed to be uſed by

" this act, with intent to defraud his Majesty, his heirs, &c. Ch. XIX. § 30.
" of the said duty; every person so offending, and being *By statute. Of Legacy receipts, &c.*
" thereof lawfully convicted, shall be adjudged a felon with-
" out benefit of clergy."

§ 31.

By stat. 39 & 40 Geo. 3. c. 89. s. 25. " The commission- 39 & 40 Geo. 3. c. 89.
" ers of the navy, ordnance, or victualling may sell and *Making or publishing false certificates of naval or military stores. Vide tit. Larceny, s. 53 & 148.*
" dispose of any of the stores aforesaid, marked as aforesaid,
" (i. e. by s. 1. any stores of war, or naval, ordnance, or
" victualling stores, or any goods whatsoever marked as in
" the stats. 9 & 10 W. 3. c. 41. and 9 Geo. 1. c. 8. are
" expressed, or any canvas marked either with a blue streak
" in the middle, or with a blue streak in a serpentine form,
" or any bewper otherwise buntin wrought with one or
" more streaks of raised tape; the said stores of war, or na-
" val, ordnance, or victualling stores or goods, or any of
" them being in a raw or unconverted state, or being new
" or not more than one third worn;) as they might have
" done before the making of this act; and such person
" or persons as heretofore have or shall hereafter buy
" any such stores, or other stores so marked as aforesaid
" of the said respective commissioners, may keep the
" same without incurring the penalty of this act or any
" other law, upon producing a certificate or certificates
" under the hand and seal of three or more of the said com-
" missioners that they bought such goods or stores from them
" at any time before they sold or delivered the same, or be-
" fore the same were found in their custody, or a certificate
" from such person or persons as shall appear to have bought
" the said stores from the said commissioners, that the stores
" so sold or delivered by them, or so found in their custody,
" were the stores or part of the stores so bought of the said
" commissioners as aforesaid; in which certificate or certifi-
" cates the quantities of such stores shall be expressed, and
" the time when, and where bought of the said commission-
" ers; who, or any three or more of them, and also the
" person or persons afterwards selling the same, are hereby
" empowered to give such certificate to such person or per-
" sons as desire the same, and have bought or shall buy any
" of the said stores, within thirty days after the sale and de-
" livery thereof." Then by s. 26. " If any person or per-
" sons shall make, sign, or give any false certificate, bill of

Ch. XIX. § 31. *By ſtatute. Of certificates of naval or military ſtores.*

" parcels, or other inſtrument, purporting the identity or " the ſale or diſpoſal of any goods or ſtores, as goods or " ſtores ſo purchaſed of the ſaid commiſſioners as aforeſaid; " or if any perſon or perſons ſhall utter or publiſh any ſuch " falſe certificate, &c. purporting as aforeſaid, knowing the " ſame to be falſe; every ſuch offender upon conviction ſhall " forfeit 200l. and be further corporally puniſhed by pillo- " ry, whipping and impriſonment, or by any or either of " the ſaid ways and means, in ſuch manner and for ſuch " ſpace of time as to the judge or juſtices before whom " ſuch offender ſhall be convicted ſhall ſeem meet. Pro- " vided ſuch judge, &c. may mitigate the ſaid penalty of " 200l. as they ſhall ſee cauſe. One moiety of which pe- " nalty ſhall be to the King, and the other moiety with full " coſts to the informer," &c.

Penalty 200l. and corporal puniſhment.

1 Geo. 1. ſt. 2. c. 25. *Counterfeiters of the hand of the treaſurer, &c. to any bill, ticket, or other paper diſpoſing of naval treaſure, to be committed.*

By ſtat. 1 Geo. 1. ſt. 2. c. 25. ſ. 6. " Every perſon or per- " ſons who ſhall counterfeit the hands of the treaſurer, " comptroller, ſurveyor, clerk of the acts or of the commiſ- " ſioners of the navy, or any of them, or the hand or hands " of the ſigning or vouching officers of his Majeſty's navy, " ſhips, or yards, or of any one or more of them, to any " bill, ticket, or other papers, by virtue whereof his Majeſty's " naval treaſure is or may be paid or diſpoſed of; or ſhall " knowingly produce any ſuch counterfeit ticket, bill or other " paper; every ſuch offender ſhall and may be lawfully com- " mitted to priſon by any of the ſaid officers or commiſſioners " until he find ſurety to appear at the next general aſſizes or " quarter ſeſſions for the county, &c. where ſuch offender " ſhall be ſo committed to priſon, to be there proceeded " againſt according to law."

§ 31. *b.* *Land tax redemption act.* 42 G. 3. c. 116.

By the ſtat. 42 Geo. 3. c. 116. which conſolidates all the acts for the redemption and ſale of the land-tax, it is enacted (ſ. 194.) " That if any perſon ſhall forge, counterfeit, or " alter, or cauſe or procure to be forged, counterfeited, or " altered, or knowingly or wilfully act or aſſiſt in the forg- " ing, &c. any contract or contracts, for the redemption or " ſale of any land-tax, or any aſſignment or aſſignments of " any ſuch land-tax, or of any ſuch contract or contracts, " or of any portion of land-tax therein compriſed, or any " certificate or certificates of the commiſſioners of land-tax " or of ſupply, or of any chief magiſtrate authoriſed by this " act

" act to make out such certificate or certificates, or of the " surveyor general of the land revenue of the Crown, or of " the duchy of Cornwall, or any certificate or certificates, " receipt or receipts, of the cashier or cashiers of the go- " vernor and company of the Bank of England, or any cer- " tificate or certificates, or attested copy of any certificate " or certificates directed by this act to be made out by the " proper officer; or shall wilfully *deliver* or *produce* to any " person or persons acting under the authority of this act, " or shall *utter* any such forged, counterfeited, or altered " contract or contracts, assignment or assignments, certifi- " cate or certificates, receipt or receipts, knowing the same " to be forged, counterfeited, or altered, with intent to de- " fraud his Majesty, his heirs, &c., or any body or bodies " politic or corporate, or company, or other person or per- " sons whomsoever; in every such case, all and every per- " son or persons so offending, and being lawfully convicted " thereof, shall be adjudged guilty of felony without benefit " of clergy."

Ch. XIX. § 31 b. *By statute. Of land-tax redemption documents.*

6. *Private Papers, Securities, and Documents.*

§ 32.

The stat. 5 Eliz. c. 14. s. 2. enacts, " That if any person or " persons shall of his or their own imagination or by false con- " spiracy or fraud with others, wittingly, subtilly, and falsely " forge or make, or subtilly cause or wittingly assent to be " forged or made, any false *deed*, *charter*, or *writing sealed*, *court* " *roll*, or the *will* of any person in writing, to the intent that " the state of freehold or inheritance of any person or persons " of, in, or to any lands, tenements, or hereditaments, freehold " or copyhold, or the right, title, or interest of any person or " persons of, in, or to the same, or any of them, shall or may " be molested, troubled, defeated, recovered, or charged; " or shall *pronounce*, *publish*, *or shew forth in evidence* any " such false and forged deed, charter, writing, court roll, or " will, as true, knowing the same to be false and forged as " aforesaid, to the same intent; and shall be thereof con- " victed either upon action or actions of forger of false " deeds, to be founded upon this statute at the suit of the " party grieved, or otherwise according to law; he shall pay " unto the party grieved his double costs and damages, to " be assessed in that court where such conviction shall be, " and

5 Eliz. c. 14. *Forging deeds, charters, writings sealed, court rolls, or wills, with intent to molest the freehold or inheritance of any.* Vide Pult. de pace, 45, 6.

Ch. XIX. § 32. *By ſtatute. Of private ſecurities, &c. by* 5 Eliz. c. 14.

" and alſo ſhall be ſet upon the pillory in ſome open market " town or other open place, and there to have both his " ears cut off, and alſo his noſtrils to be ſlit and cut, and " ſeared with a hot iron ſo as they may remain for a perpe- " tual mark of his falſehood, and ſhall forfeit to the Queen " the whole iſſues and profits of his lands and tenements " during his life, and alſo ſhall ſuffer perpetual impriſon- " ment during his life," &c.

Or to the prejudice of termors.

And by ſect. 3. " If any perſon or perſons ſhall (as afore- " ſaid) wittingly, ſubtilly, and falſely forge or make, or " wittingly, ſubtilly, and falſely cauſe or aſſent to be made " and forged any falſe *charter*, *deed*, or *writing*, to the in- " tent that any perſon or perſons ſhall or may have or claim " *any eſtate or intereſt for term of years* of, in, or to any ma- " nors, lands, tenements or hereditaments, not being copy- " hold, or any annuity in fee ſimple, fee tail, or for term " of life, lives, or years; or ſhall as aforeſaid forge, make, " or cauſe or aſſent to be made or forged any *obligation* or " *bill obligatory*, or any *acquittance*, *releaſe*, or other diſcharge " of any debt, account, action, ſuit, demand, or other things " perſonal; or ſhall pronounce, publiſh, or give in evidence " any ſuch falſe and forged charter, deed, writing, obliga- " tion, bill obligatory, acquittance, releaſe, or diſcharge, as " true, knowing the ſame to be falſe and forged, and ſhall " be thereof convicted as aforeſaid; then he ſhall pay the " party grieved his double coſts and damages, to be aſſeſſed " in ſuch court where ſuch conviction ſhall be had, and " ſhall be alſo ſet on the pillory in ſome one market town " or other open place, and there to have one of his ears cut " off, and ſhall alſo be impriſoned for one year, without " bail or mainprize."

3 Inſt. 172. 1 Hawk. ch. 70. ſ. 24.

Which double damages it appears ſhall be governed by the penalty, and not by the debt appearing due in the condition.

By ſ. 5. a defendant convicted upon this act, who ſhall have received thereupon puniſhment corporal according to the act, ſhall not be impeached again for the ſame offence.

Second offence felony.

By ſ. 7. " If any perſon convicted or condemned of any " of the offences aforeſaid by any of the ways above limited " ſhall after any ſuch conviction or condemnation eftſoons " commit

" commit any of the said offences in form aforesaid, every " such second offence or offences shall be adjudged felony, " and the parties being convicted or attainted thereof shall " suffer such pains of death, and forfeiture, &c. as in cases " of felony, without benefit of clergy." But by s. 8. this shall not take away dower or corrupt the blood. Ch. XIX. § 32. *By statute. Of private securities, &c by* 5 Eliz. c. 14.

The 7th sect. includes one who, having being convicted for forging a deed, afterwards knowingly publishes the forged deed of another. 3 Inst. 172.

There must be a *conviction by judgment* of a first offence *before* the second offence be *committed*; otherwise it is not felony: the record of which conviction must be set out in the indictment for the second offence, in order that it may appear to be a conviction of such a forgery as is within the statute; but a prior conviction of any offence within the statute is sufficient. 1 Hale, 686. 1 Hawk. ch. 70. s. 25. 3 Inst. 172.

Sect. 10. gives power to justices of oyer and terminer and of assize to hear and determine the offences. Under this the Judges of B. R. have jurisdiction, but not justices of the peace in Sessions. 1 Hale, 687 Cro. Eliz. 87.

Sect. 11. repeals all former statutes provided for forgery of false deeds, charters, muniments, or writings.

Sect. 15. provides that the act shall not extend " to any " attorney, lawyer, or counsellor, who shall for his client " plead, shew forth, or give in evidence any false and forged " deed, charter, will, court roll, or other writing for true, " being not party or privy to the forging of the same, &c.; " nor (by s. 16.) to any person who shall plead or shew forth " any deed or writing exemplified under the great seal, or " under the seal of any other authentic court of this realm, " nor to any Judge or other person who shall cause any seal " of any court to be set to any such deed, charter, or writing " enrolled, not knowing the same to be false or forged." By s. 12. there is a similar exception in favour of proctors, &c. in the ecclesiastical courts. *Exception as to attornies, &c.*

The above statute of Elizabeth has now nearly fallen into disuse since the passing of the stat. 2 Geo. 2. c. 25. which extends to all deeds and wills, upon which the prosecution is easier and the punishment capital in the first instance. There are besides several particular statutes, before noticed, § 33. *Construction on* 5 Eliz. c. 14. *Vide* Crooke's case, post. 921.

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ticed, adapted and confined to the forgery of the like inſtruments in the names of particular perſons or corporations. And it may be remarked once for all, that the ſame general rules of conſtruction will apply equally to the ſame inſtruments named in the ſeveral ſtatutes paſſed in pari materiâ, and all muſt neceſſarily be governed by the ſame principles of the common law.

3 Inſt. 170, 2. 1 Hawk. ch. 70. ſ. 18. 1 Hale, 684. Noy. 42. 2 Bac. Abr. 280. &c.

The firſt branch of the ſtatute is confined to forgeries affecting the eſtate in poſſeſſion, or the right, title, or intereſt of any perſon in or to the freehold or inheritance of the lands, &c.; as the enſuing branch is to be underſtood when the forgery is to the moleſtation of a termor. But a forgery of a rent-charge or even of a leaſe for years in the name of one who is ſeiſed of the freehold or inheritance is within the former part; and the words *for a term of years* in the ſecond branch relate to ſuch an eſtate or intereſt in eſſe before.

1 Hawk. ch. 70. ſ. 17. 22. 3 Inſt. 169. 1 Hale, 684. Taverner's caſe, Dy. 322. 15 H. 7. 16.

The words "*writing ſealed*" have been holden to extend to a falſe cuſtomary of a copyhold manor, under the ſeals of ſeveral of the tenants, containing falſe cuſtoms to the diſheriſon of the lord, and purporting to be by the conſent of all the tenants and the allowance of the lord: and ſo a ſtatute merchant or recognizance in nature of a ſtatute ſtaple is within the ſtatute, as having the ſeal of the party; though it is doubted in Rolle whether a ſtatute ſtaple be ſo, becauſe it need only have the ſeal of the ſtaple.

2 Roll. Abr. 466. (F), pl. 2, 3. 5. Ib. pl. 4. et *vi.* 3 Inſt. 171.

3 Inſt. 169, 170, 1. 1 Hawk. ch. 70. ſ. 19. 26. Marriott's caſe, 2 Show. 5.

By the firſt clauſe the deed, charter, or writing muſt be ſealed, and ſo it muſt appear in the indictment; but the court roll or will need not be ſealed. And this holds good alſo in the conſtruction of the ſecond branch, where the word *writing* extends to a will whereby a term for years is deviſed; as the word *will* in the firſt branch means a will concerning the freehold and inheritance. But I cannot reconcile with the words of the ſtatute what is ſaid by Lord Coke and Lord Hale, that a will in writing concerning goods only is within the ſecond branch; and the paſſage in Dyer referred to by Lord Coke does not ſupport the poſition.

3 Inſt. 171. 1 Hale, 685. Dy. 302. b.

3 Inſt. 171. 1 Hawk ch. 70. ſ. 21, 22. 3 Leon. 170.

The words "any obligation or bill obligatory" in the ſame clauſe muſt be intended of ſuch as are ſealed. But the forgery of a deed containing a mere gift of perſonal chattels is not within it.

The

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The forgery of a leaſe of lands in Ireland is ſaid not to be within this ſtatute, but puniſhable as a miſdemeanor at common law (*a*).

The caſe of Crooke may be referred to as a good explanation of the ſtatute. That was an indictment on the ſtat. 5 Eliz. c. 14. for forgery, wherein Garbut and his wife were ſaid to be ſeiſed of certain meſſuages lands and tenements called *Jawick*, (containing in fact 300 acres). and the conveyance forged by the defendant was of Jawick *Park*, containing 4000 acres, which was charged to be done with intention to cheat Garbut and his wife. After conviction and a motion for a new trial, which was denied, it was moved in arreſt of judgment, and the caſe was argued at great length, and was under conſideration for ſeveral terms. The Court took time to conſider of their judgment; and finally the Chief Juſtice delivered their opinion, that the act of parliament did not mean that there ſhould be a forged conveyance of the very lands; but if it were any deed whereby the party might be moleſted it was ſufficient. That in this caſe the variance was only as to the deſcription of the lands; and if ſuch a variation were to get the offender off, it would defeat the ſtatute. That it was not neceſſary that the land ſhould be really affected by the forged deed, or that the party ſhould be evicted; but if he might be diſturbed by it, it was within the intent of the act of parliament. That in this caſe it was proved that after the deed was forged the defendant ſent word that he had purchaſed Jawick, and that he had actually taken out writs againſt the tenants of Jawick in order to eject them.

R. v. Crooke, B R. E. 4 G. 2. Maſterman's Notes, S.C. 2 Str. 901. and more fully in Fitzg. 57. and 261. *On an indictment for forgery within the ſtat.* 5 Eliz. *it is ſufficient if the party may be moleſted in his poſſeſſion, though he be not evicted: and a variance of Jawick Park for Jawick in the forged deed is not material* *Vide* the precedent of this indictment at large in Crown Circ. Comp. tit. *Forgery*, 112. (edit. 1738).

Sir J. Strange's report in ſomewhat ſtronger terms ſtates that the Court relied on the words of the act, "*to the intent* "that the ſtate of freehold, &c. of any perſon to any lands, "&c. or the right or title of, in, and to the ſame, ſhall or "may be moleſted, troubled, defeated, recovered or "charged:" By which it appeared that it was not neceſſary that there ſhould be a charge, or *a poſſibility of a charge*; it was ſufficient if it were done *with that intent*; and the jury had found that it was done with intent to moleſt Garbut and his wife in the poſſeſſion of their lands.

2 Str. 902.

Vi poſt. what was ſaid by Lee J. on the prior day.

The defendant received judgment as directed by the ſtatute, viz. to be ſet in the pillory at Charing Croſs, to have

(*a*) 1 Hawk. ch. 70. ſ. 20. 1 Hale, 684. 3 Leon. 170.

both

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both his ears cut off, his noſtril ſlit and ſeared with a hot iron, his rents forfeited to the King for life, and to be impriſoned during life.

MS. ante,

In the courſe of the diſcuſſion all the Judges delivered their opinions, and agreed that the intent of the party to moleſt &c. the eſtate was a matter of fact proper to be left to the jury upon the evidence, and that the *quo modo* which was evidence of ſuch intention need not be ſtated in the indictment. The principal queſtion ſeemed to be, whether it were neceſſary to bring the caſe within the ſtatute that the deed, ſuppoſing it to be genuine, ſhould be ſuch as might poſſibly have an effect; which Ld. C. J. Raymond ſeemed to think this deed could not have by reaſon of the variance; it not being laid in the indictment that Garbut was ſeiſed of Jawick Park, or that *Jawick Park* was part of *Jawick*, or that the lands were known as well by the one name as the other, or any other matter whereby to aſcertain them to be the ſame, [and there being no averment of any previous treaty concerning Jawick in conſequence whereof there was a conveyance of Jawick Park, which (if it had been a real tranſaction) would, he thought, have laid a foundation for a court of equity to decree a conveyance of Jawick: ſo that, he obſerved, the objection in all its force was reduced to this, that upon the face of the indictment no title could be made either in law or equity to the lands of Jawick.] Page J. obſerved, that the ſtatute did not require that the deed ſhould be for the conveyance of lands or any thing elſe in the poſſeſſion of the party: but it might be any deed by which the party might be diſturbed, and the intent was a matter of fact proper to be left to the jury. No ejectment would lie in this caſe; nor even if the conveyance had been of *Jawick* could it have had any effect, being a forged deed, which was no deed at all. But he ſeemed to think that if the deed had been really executed by Garbut and his wife, with that miſtake, a court of equity would have obliged them to execute a proper deed. And if they would have been liable in caſe of a true deed, they might be ſaid to be liable to be diſturbed under colour of a falſe one till it was diſcovered to be ſuch. Probyn J. alſo thought that the eſtate would have been bound in equity if it had been a true deed with ſuch a miſtake in it. Lee J. ſaid, that all that was neceſſary was to charge ſuch facts in the

The words within the crotchets are taken from Fitzgibbon's Report. The reſt is taken in ſubſtance from Maſterman's MS. Notes.

the indictment as constituted the offence created by the statute; and it was not necessary to lay those facts which were evidence of the intention, because that was proper for the jury, and they had found the intention. And though the deed as it was set out might not have any operation in law, yet the intention of the defendant might be as much to molest the possession of Garbut as if the deed had been good.

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§ 34. *Forging deeds, wills, bonds, bills, notes, acquittances or receipts for money or goods— capital by* 2 G. 2. c. 25. 9 G. 2. c. 18. 31 G. 2. c. 22. s. 78.

By stat. 2 Geo. 2. c. 25. made perpetual by stat. 9 Geo. 2. c. 18. "if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, &c. or willingly act or assist in the false making, &c. any *deed, will, testament, bond, writing obligatory, bill of exchange, promissory note* for payment of money, *indorsement* or *assignment* of any bill of exchange or promissory note for payment of money, or any *acquittance* or *receipt* either for money or goods, with intent to defraud any person whatsoever, [and by stat. 31 Geo. 2. c. 22. s. 78. with intent to defraud any corporation whatsoever]: or shall *utter or publish* as true any false, forged or counterfeited deed, &c. with intent to defraud any person (or corporation), knowing the same to be false, forged or counterfeited; every such person being thereof lawfully convicted shall be deemed guilty of felony without benefit of clergy."

7 Geo. 2. c. 22. *Extending to acceptances, accountable receipts, orders for payment of money, or delivery of goods.*

The stat. 7 Geo. 2. c. 22. (made to supply the defects of the former act which it recites, and reciting further that no punishment is inflicted by the said act on such as commit the offences thereinafter set forth,) enacts, that "if any person shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, &c.; or willingly act or assist in the false making, &c. any *acceptance of any bill of exchange*, or the *number* or *principal sum* of any *accountable receipt for any note, bill, or other security for payment of money*, or any *warrant or order* for *payment of money, or delivery of goods*: with intent to defraud any person whatsoever, [and by stat. 18 Geo. 3. c. 18. with intent to defraud any corporation;] or shall utter or publish as true any false, altered, forged or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention

18 Geo. 3. c. 18.

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" tion to defraud any perſon (or corporation), knowing the " ſame to be falſe, altered, forged or counterfeited; then " every ſuch perſon being thereof lawfully convicted ſhall " be deemed guilty of felony without benefit of clergy (*a*)."

In the ſtatute of 7 Geo. 2. there is no expreſs ſaving of corruption of blood as in the others: and by ſ. 4. of the ſtat. 2 Geo. 2. c. 25. the act is not to extend to Scotland.

§ 35. *Writing obligatory.*

I now proceed to note ſuch determinations as have aſcertained what ſort of inſtruments come within the deſcriptions in the abovementioned ſtatutes.

(*a*) Many of the caſes upon theſe ſtatutes have turned more upon the general principles of forgery than on the particular conſtruction of the words of the ſtatutes themſelves. Theſe therefore may be more conveniently diſtributed under the general heads of inquiry. Thus under the 4th head, concerning the validity in law of the thing forged, are noticed the caſe of Japhet Crooke, for forging a leaſe and releaſe; Coogan's caſe in 1787; Murphy's caſe in 1753; and Stirling's caſe in 1773, for forging wills in the names of living perſons; Fitzgerald and Lee's caſe in 1741, for forging the will of a deceaſed ſeaman, with a variance in the name in different parts of it. So caſes of forging Bank notes, &c. where the queſtion has turned on the degree of ſimilarity to the true one, as Jones's caſe and others. So Reading's caſe in 1793, for forging an acceptance in a different name from that of the perſon to whom the bill of exchange was directed; Moffatt's caſe in 1787, for forging a bill of exchange for a leſs ſum than 5*l.* which is diſallowed by ſtat. 17 Geo. 3. c. 30; Wall's caſe in 1800, for forging a will of land atteſted only by two witneſſes; and Hawkeſwood's caſe in 1783, and others ſince, for forgery of bills of exchange which appeared without ſtamps.

Under the 5th head of inquiry, how far uſing a fictitious name or perſonating the true man, &c. will affect the offence. Lewis's caſe 1754, for forging a power of attorney; and Wilks's caſe in 1767, for forging a bill of exchange; Aickles's caſe, for forging a promiſſory note; Bolland's caſe, for forging an indorſement on a promiſſory note; Taft's caſe in 1777, for the like; Lockett's caſe in 1772, and Shepherd's caſe in 1781, for forging orders for payment of money; and *Taylor's* caſe in 1779, for forging a receipt for money; all forgeries in the names of fictitious perſons, whoſe characters were in ſome inſtances aſſumed by the priſoners; and Dunn's caſe 1769, for forging a promiſſory note; and the caſe of Mead v. Young, for forging an indorſement of a bill of exchange; both in the names of real perſons; and many others of the like ſort will be found.

Under the 8th head of inquiry, as to the indictment and evidence, Maſon's caſe, for uttering a forged acceptance of a bill the tenor of which was not ſet forth, and others of that ſort; Teſtick's caſe in 1774, and Hunter's caſe in 1794, for forging a receipt for money; Reading's caſe in 1793, for forging a bill of exchange; Gilchriſt's caſe in 1795, for forging an order for payment of money; Jones and Palmer's caſe in 1785, for forging a deed and a receipt for money; Dunnett's caſe in 1792, for forging a bond and writing obligatory; and various other caſes, where the queſtions have either turned on the manner of charging the offence, or the application of the evidence to the charge.

Writing-

Writing-Obligatory.

Ch. XIX. § 35. *By ſtat.* 2 Geo. 2. c. 25, *&c. Of deeds, wills, notes, receipts, &c.*

In Dick's caſe, who was indicted and convicted of knowingly uttering a forged writing-obligatory commonly called a Scotch bank note in this form;

" Five Pounds. Bond accord. Sterling.
" No. 157.
28 " Aberdeen, 1 May 1767.
" The Banking Company in Aberdeen are hereby obliged
" to pay to Js. Brand or bearer on demand at their office
" here, five Pounds ſterling, by order of the Directors.
" W. Brebner, } Directors. R. Sunderland,
" J. Burnett, } Caſhier."

Dick's caſe, Newcaſtle, 1770. MS. Gould J. 1 Leach, 79. S.C. Qu. *Whether uttering in England a promiſſory note of a Scotch Bank payable in Scotland be within the ſtat.* 2 G. 2. c. 25.

the Judges were divided in opinion whether ſuch a note were within the meaning of the ſtat. 2 Geo. 2. c. 25.; and whether the uttering it in England were felony; the ſtatute (ſ. 4.) having negatively excluded Scotland; and the note being made payable locally where it was drawn. At length the priſoner received the King's pardon.

Receipt for Money. § 36.

William Teſtick was found guilty on the ſecond count of an indictment, which charged that he feloniouſly uttered and publiſhed as true a certain falſe, forged, and counterfeited *receipt for money*, with the name " Stephen Withers of, &c. " for the ſum of 1l. and 4s., which laſt-mentioned falſe, " &c. receipt, is as follows," viz.

" 18th March 1773.
" Received the Contents above by me,
" Stephen Withers."

Teſtick's caſe, Bodmin Sum. Aſſ. 1774, MS. Gould J. *Indictment for publiſhing a forged receipt for money in the terms of the receipt itſelf, " Received the " contents above, " by me, &c." without ſetting forth the bill of items to which is referred, is ſufficient; for that is matter of evidence. Vide* poſt. ſ. 53.

with intent to defraud R. Goadby, he the defendant at the ſaid time when, &c. well knowing the ſaid receipt to be forged, &c.

It appeared in evidence that Goadby ſold Lottery tickets and ſhares, and paid the money for prizes; and that the priſoner was employed by him to carry out the prize money with an account of the deductions to pay it to the party, and bring back his receipt. On the 16th of March 1773 the priſoner had the following account delivered to him with money to pay the balance:

No.

Ch. XIX. § 36. *By ſtat.* 2 G. 2. c. 25, *&c. Of deeds, &c. and receipts.*

No. 38,811.

Mr. Withers.	£.	s.	d.
One 16th of a £. 20 Prize - -	1	5	0
Deduct for expences advancing and remitting money to you - - -	0	1	0
	1	4	0

which account the priſoner on ſettling his accounts produced to Goadby, with the receipt ſtated in the indictment at the bottom of the ſaid account, and took credit for the amount, knowing that Withers had not been paid; and having made excuſes to him for the omiſſion. It was proved by Withers who had before the trial been paid the money by Goadby, that the receipt was not his hand-writing.

It was objected by the priſoner's counſel that this receipt did not correſpond with the indictment; for nothing was ſet forth but the receipt as for *the contents above:* and that together with the bill of particulars was one entire thing; and it being ſet forth, "which ſaid falſe receipt, &c. is as follows," the whole ought to have been ſet forth, and not part only. namely, "*the contents above*;" which did not appear to be the ſame, nor to be a receipt for money. And this objection was likewiſe urged after conviction in arreſt of judgment as to the inſufficiency and inconſiſtency of the indictment; in this, that it did not appear by the receipt ſet out in the indictment that it was a receipt *for money*, or what it was for; and being only for *the contents above*, and nothing ſet forth to ſhew what they were, or explain the receipt, it was unintelligible. After conviction judgment was reſpited: but in Michaelmas term 1774 the Judges were of opinion that the indictment was ſufficient; for it was "*Received* "*the contents above*," which ſhewed it to be a receipt for ſomething though the particulars were not expreſſed; and it was laid to be a forged *receipt for money* under the hand of S. W. for £. 1 4 0; and the bill itſelf was only evidence of the fact, and ſhewed it to be a receipt *for money* as charged.

(Abſent De Grey C. J. and Perrott B.; and by Serjt. Foſter's MS. Eyre B. doubting.)

Vide Taylor's caſe, poſt.

Harriſon's caſe, O. B. Sept. 1777, cor. Blackſtone J. MS. Buller J. (1 Leach, 215. S. C.

John Harriſon was accomptant to the London Aſſurance Company, who kept their caſh with the Bank of England. For which purpoſe the Bank furniſhed the company with a book, the title of which was, "Debtor, the Bank of Eng-

"land,

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" land, with the London Aſſurance, creditor." When any money or bank note was paid into the Bank, the clerk of the Bank entered the amount on the debtor ſide, to which he ſigned his name. And on the other hand, when the company drew for money, the caſhier of the Bank *wrote off* ſo much from their bank book. This bank book was kept by the priſoner, as accomptant to the company, and ſent by him to the Bank as occaſion required. And one John Clifford the Bank clerk having entered on the debtor ſide of the account book " 1777. June 16. Bank notes. C. £. 210." as ſo much received for the uſe of the Aſſurance Company, the priſoner prefixed the figure 3 to the ſum, thereby making the ſum received to be £. 3210. The priſoner was indicted for this forgery, and the indictment contained different ſets of counts, the one ſet framed on the ſtats. 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. ſ. 78. charging the priſoner with forging and uttering a certain *receipt for money*, viz. " 1777. " June 16. Bank notes. C. £. 3210.", with intent reſpectively to defraud the Bank of England, and the London Aſſurance Company. The other ſet framed on the ſtat. 7 Geo. 2. c. 22. charging the priſoner with altering and uttering a certain *accountable receipt for bank notes for payment of money* (ſetting it out as before) viz. the ſaid ſum of £. 210, by prefixing the figure 3 to the ſaid figures and cypher £. 210, whereby the words, &c. " 1777. June 16. Bank " notes. C. £. 210," together with the figure 3 imported that J. C. a clerk of the Bank of England had received bank notes to the amount of £ 3210, with the like intent.

A forged receipt for Bank notes *is not a receipt for* money *or* goods *within the ſtat.* 2 Geo. 2. c. 25. *nor is ſuch forgery with intent to defraud a* corporation *within the ſtat.* 7 Geo. 2. c. 22. *though now it is within the ſtat.* 18 Geo. 3. c. 18.

It was firſt objected that the caſe was not within the firſt ſet of counts, which were framed on the ſtats. 2 & 31 Geo. 2. thoſe ſtatutes being confined to receipts for *money* or *goods*, and this being a receipt for *bank notes*, which were neither money nor goods; and that the Legiſlature had ſo thought by paſſing the ſtat. 7 Geo. 2. in which *bills*, *notes*, &c. are particularly mentioned. And the Court allowed this objection. It was next objected as to the other ſet of counts, that the ſtat. 7 Geo. 2. on which they were framed (though otherwiſe including ſuch a receipt) was confined to offences of this deſcription done with intent to defraud any *perſon*; whereas this was laid with intent to defraud the two corporations

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tions reſpectively named. That the Legiſlature had decided the validity of the objection by paſſing the ſtat. 31 Geo. 2. c. 22. which reciting that doubts had ariſen whether the word *perſon* extended to a corporation, re-enacts the proviſions of the ſtat. 2 Geo. 2. c. 25. as applicable to corporations, but omitted to include the offences named in the ſtat. 7 Geo. 2. This point was reſerved for the opinion of the Judges, and the priſoner was acquitted on the firſt ſet of counts and convicted on the ſecond ſet. But the Judges afterwards decided this objection alſo in favour of the priſoner, and he was diſcharged. The defect however is now ſupplied by the ſtat. 18 Geo. 3. c. 18. before ſet forth.

Ante, 923.

1 Leach, 218. *Forging a receipt for Bank notes in theſe words, "* 1777, *June* 16, *Bank notes* C. 3210*l." is an accountable receipt within the ſtat.* 7 Geo. 2. *being written in a book kept for the purpoſe of entering receipts of money for the uſe of the parties. Vide* the Precedent at large in the *Crown Circuit Aſſiſtant*, 280. and *vide* Hunter's caſe, poſt.

In the printed report of this caſe it is alſo ſaid that the Judges were clearly of opinion that the entry in the bank book as ſet forth was an *accountable receipt* within the meaning of the act, though no opinion was publicly given. The ground of this opinion was afterwards alluded to by Groſe J. in Lyon's caſe after mentioned (*a*). It does not appear whether this opinion were formed with reference to the manner in which the offence was laid in the indictment, which no otherwiſe connected the entry itſelf forged with the book in which it was made than by averring that the defendant forged, &c. "a certain receipt for money, purporting to be a receipt "given on the 16th of June 1777 by one J. C. (which ſaid "J. C. then, &c. was and ſtill is a clerk of the governor "and company of the Bank of England, entruſted and em-"ployed by the ſaid governor, &c. to give receipts on their "behalf for ſuch ſums of money, notes, &c. as he might "receive for the ſaid governor, &c.) for and on behalf of "the ſaid governor, &c. to a certain corporation called "*The London Aſſurance*, for the ſaid governor," &c. (Then after ſetting forth the tenor of the receipt as before mentioned) "which ſaid receipt for money, &c. did import, ſignify and expreſs that the ſaid J. C. as clerk of the ſaid governor, &c. had on the 16th of June 1777 received of the ſaid corporation called The London Aſſurance the ſum of £.3210, with intent to defraud," &c.

(*a*) P. 938.

Hunter's caſe, O. B. Dec. 1704, cor. Perryn, B. MS. Jud. (2 Leach. 711. S. C.)

William Hunter was tried on an indictment charging, that he had in his poſſeſſion a paper partly printed and partly written, called a navy bill, ſigned by Sir A. Hammond, Bart. (and others) three of the principal officers and commiſſioners

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of his Majeſty's navy; which ſaid paper is to the tenor and effect following, that is to ſay, "Extra. Received the "20th Sept. 1799. No. 660. To Edward Wilſon, pilot "extra, in reward for his ſervice, between the 1ſt June and "the 8th Sept. 1794, in piloting his Majeſty's ſloop Lord "Mulgrave from the river Humber to the Downs, thence "to Spithead, and back to the river Humber, and attend-"ance, as appears by a certificate remaining in the comp-"troller's office, the ſum of £. 25.

A. S. Hammond. S. Henſlow. Geo. Marſh."

And under which ſaid paper partly printed, &c. called a navy bill, was then and there contained a certain order in writing for payment, called an aſſignment, for payment of the ſum of money mentioned in the ſaid paper, &c. called a navy bill, bearing date 24th Sept. 1794, and ſigned by G. Marſh, Eſq. Geo. Rogers, Eſq. and Samuel Marſhal, Eſq. three of the ſaid principal officers and commiſſioners of his Majeſty's navy; and which ſaid order in writing for payment, called an aſſignment, for payment of the ſaid ſum of money mentioned in the ſaid paper partly printed, &c. called a navy bill, is to the tenor and effect following, that is to ſay, "No. 6460. to be paid out of £. 2000 received 8th "Sept. 1794, and appointed to pay pilotage on the head of "wages.

"G. Marſh. G. Rogers. S. Marſhall.

"Aſſigned the 24th Sept. 94.

O. S."

Upon which ſaid paper writing was then and there contained a certain indorſement partly printed and partly written by one Wm. Davis, chief clerk to the comptroller of his Majeſty's navy in his office for bills and accounts, which ſaid indorſement is to the tenor and effect following, that is to ſay, "The certificate within mentioned is indorſed by "Ed. Wilſon payable to Mr. Wm. Thornton.

"T. Davis."

The indictment then charged that the priſoner did feloniouſly forge, &c. a certain receipt for money, to wit, for the ſum of 25 l. mentioned and contained in the ſaid paper partly written, &c. called a navy bill; which forged receipt is as follows, that is to ſay, "Wm. Thornton." "Wm.

2 O "Hunter,"

It is not ſufficient in an indictment for forging a receipt to an aſſignment for payment of a certain ſum in a navy bill to ſtate ſuch navy bill and ſuch aſſignment, and then charge that the priſoner forged a receipt for money mentioned in the ſaid navy bill as follows; viz. "Wm. Thornton, "Wm. Hunter;" becauſe the mere ſigning ſuch names, unleſs connected with the previous matter, does not neceſſarily purport on the face of it to be a receipt: but it ſhould be averred that ſuch navy bill, &c. together with ſuch ſignature, did purport to be and was a receipt, &c. and that the priſoner did feloniouſly forge the ſame.

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"Hunter," with intention to defraud his Majeſty, againſt the ſtatute, &c.

A ſecond count ſtated the navy bill, the order for payment, and indorſement, in the ſame manner as in the firſt count; and then ſtated that to the ſaid laſt-mentioned paper partly written, &c. called a navy bill, was annexed and written a certain falſe, forged, and counterfeited receipt for money, to wit, for the ſum of 25 l. in the ſaid laſt-mentioned paper partly printed, &c. called a navy bill; which ſaid falſe, forged, and counterfeited receipt for money is as follows; that is to ſay, "Wm. Thornton." "Wm. Hunter." And that the priſoner did utter and publiſh as true the ſaid laſt-mentioned forged and counterfeited receipt for money, with intent to defraud his ſaid Majeſty; he well knowing the ſame to be falſe, &c. There were other ſimilar counts, ſome charging the inſtrument forged to be an *acquittance*; others ſtating the intention to be to defraud Wm. Thornton and other perſons.

On the trial it appeared that Edward Wilſon, who had been pilot of the Lord Mulgrave, having received from his captain a certificate of his ſervice, ſent it to Wm. Thornton to receive his wages. That the priſoner was a clerk in the comptroller's office; and being employed to forward the pilot's bills through the office, got into his hands the bill ſtated in the indictment, and carried it with the order for payment and indorſement upon it, which were neceſſary for receiving the money, to the caſhier of the pay-office; having wafered to one ſide of the bill, on which was written the ſum 25 l., under thoſe figures, a four-penny ſtamp uſed for receipts, on which were written the names of "Wm. Thornton, Wm. Hunter," without any words importing that they had received the money. And it was proved that the caſhier was in the habit of paying navy bills on the owner's name being written under the ſum without any other receipt. It appeared on producing the bill that the name Major Woolhead was written at the bottom of it; with reſpect to which it was proved that it was uſual to have his name to the bills, as without it they did not regularly paſs through the office; but that a bill would not be ſtopped if his name were not put to it. There alſo appeared on one ſide of the bill the initials

initials of Mr. Davis's name, T. D. which were not ſtated in the indictment.

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After conviction, judgment was reſpited to take the opinion of the Judges on the caſe, which was argued before all the Judges (except Aſhhurſt J.) in the Exchequer-chamber, where ſeveral objections were made on behalf of the priſoner to the indictment. 1. Becauſe it did not appear by the tenor of the inſtrument as ſet forth in the indictment that it was a receipt. 2. Becauſe there was nothing ſtated in the indictment to ſhew that this could operate as an acquittance. It was argued as to the firſt, that forgery conſiſted in making a falſe inſtrument ſo as to reſemble a genuine one. That it was not ſufficient, as here, to allege generally that the priſoner forged a receipt, which was a concluſion of law, but facts muſt be ſtated to ſhew the Court that ſuch concluſion was true. Wherefore the indictment muſt ſet out the inſtrument itſelf forged, that the Court might ſee that it was ſuch as the ſtatute intended which made the forging of it felony. That here the tenor of the inſtrument ſet forth was ſimply "Wm. Thornton, Wm. Hunter," which did not import a receipt, and was ſtated as an independent inſtrument; the previous ſtatements of the navy bill, &c. having no connection with the charge, and being only ſtated as inducement. For though the ſecond count ſtated that the receipt was *annexed* to the navy bill, yet that only implied that originally the inſtrument conſidered as the receipt was ſomething independent in itſelf; and it only amounted to charging that that which was no receipt in law was ſo annexed. That this therefore was not like the caſe of an indorſement of a bill of exchange, which was always connected with and incorporated into the bill itſelf. 2. That ſuppoſing the meaning of the inſtrument need not neceſſarily appear on the face of it, ſtill this indictment was bad, inaſmuch as there was nothing which charged that the words in queſtion meant or purported (*a*) to be the receipt of any one, which was neceſſary where the inſtrument did not ſhew its meaning upon the face of it. 3. It was objected, that as

16th June 1795.

(*a*) It was aſked by Eyre C. J. Whether there were any authority to ſhew that the meaning of equivocal words could be fixed by alleging that they *purported* to be ſuch or ſuch a thing? for he conceived that the word *purport* ſignified *apparent* meaning.

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the navy bill ſet forth in the indictment had not the letters "T. D." nor the name "Major Woolhead," it varied from the navy bill proved.

It was anſwered on the part of the Crown to the two firſt objections, that it was ſufficient to ſet out the tenor of the thing forged, which here conſiſted of the name, and was averred to be a receipt for money; and the only queſtion was, whether a receipt could not conſiſt of a name, which no doubt it might, if in point of fact it were ſo intended. Then the indictment ſtated the exiſtence of the navy bill, and that to obtain payment of it the priſoner forged the name "Wm. Thornton" as a receipt, the meaning of which was properly to be aſcertained by evidence, and needed not to be ſtated on the record. 3. That the omiſſions adverted to in ſetting out the navy bill conſtituted no part of it, but were merely ſignatures or memoranda made by the clerks through whoſe offices the bill paſſed; and that they furniſhed no ground of objection in this caſe, as the navy bill was merely ſet out in the indictment by way of inducement.

In Eaſter term 1796 judgment was arreſted on the ground, that it did not appear on the face of the indictment, nor was it ſhewn by averment, that the inſtrument was a receipt. Though Buller J. thought that the ſecond count might be ſupported; conſidering this to be as much a receipt as the writing a name was an indorſement on a bill of exchange. But to this it was anſwered, that an indorſement was complete by writing the name on the bill without any thing more. Whereas the name itſelf as ſtated in the indictment was no receipt; though the name coupled with the navy bill might together form a receipt. But then it ought to be ſo ſtated; as was done in a caſe referred to in the Crown Circuit Companion, (p. 405. ed. of 1799.) which was an indictment for uttering a forged warrant for payment of a South-Sea annuity, wherein it was ſtated that one D. H. was a clerk of the S. S. Company entruſted to ſign warrants for the payment of money; and that one H. P. having in his cuſtody a certain warrant, &c. ſigned by the ſaid D. H. and directed to R. R. the caſhier of the Company for the payment of 81. to one W. D., on the back of which ſaid warrant the ſaid W. D. had ſigned his name; *which ſaid paper partly printed, &c. together with the ſaid indorſement in form aforeſaid, did purport*

to

to be and was a receipt, acquittance, and discharge, under the hand of the said W. D. for the said sum of 8 *l.*, he the said H. P. did feloniously alter, &c. (*a*)

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James Lyon was indicted for forging a scrip receipt for 2000l. 3 per cent. cons., which was charged to be *a receipt for money*, in this form:

Lyon's case, O. B Dec. 1793, 2 Leach, 681.

" £. 2000 three per cent. annuities 1793.

" By virtue of a resolution of the House of Commons for " raising £. 4,500,000 for the service of the year 1793.

" Received of the sum of £. 144 for " the deposit of £. 10 per cent. on £. 1440, sub- " scribed by him in pursuance of the above said " resolution; and upon due payment of the remain- " ing £. 90 per cent. of the said sum of £ 1440, " the said subscriber or his assigns by indorsement " hereon will in exchange for this *receipt* become " entitled to £. 2000 joint stock of 3 per cent. an- " nuities, which were consolidated at the Bank of " England by certain acts, &c., the interest to com- " mence from the 5th January 1793, &c. Witness " my hand this 4th April 1793. } £. 144

" Entered. W. Johnson. T. Thompson."

" 31st May.

" Received £. 144 for second payment.

" Entered. W. Smart. T. Thompson."

A scrip receipt with the blank for the name not filled up with the name of the subscriber, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a receipt for money *within the statutes.*

(Setting forth like receipts for other payments to the fifth inclusive;) With intent to defraud the governor and company of the Bank of England.

There were other counts laying the intent to be to defraud other parties, and for uttering the same (*b*). To this there was a demurrer on the ground that the instrument forged was not *a receipt* for money within the statutes, inasmuch as it was not filled up with the name of the subscriber or person from whom the money was received. And after argument by counsel, and consideration of the case by all the Judges to whom it was referred, they were all of opinion that the prisoner was entitled to judgment. Grose J. in delivering the opinion of the Judges observed, that the instru-

(*a*) *Vide* 2 Leach, 719. where the opinion of the Judges as delivered by Mr. Justice Grose at the O. B. in May 1796 is stated.

(*b*) Another indictment charged a similar offence as a forgery of a *scrip* receipt; to which there was also a demurrer.

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ment, the tenor of which was neceſſarily ſet forth in the indictment, was not *a receipt* for money in contemplation of law, within the meaning of the ſtatute 2 Geo. 2. c. 25, &c. That it was the duty of the caſhier, appointed by the Bank to receive ſuch ſubſcriptions, to fill up the receipts with the names of the ſubſcribers or perſons from whom they originally received the money; and until the blank left in the printed form were ſo filled up, the inſtrument did not become an acknowledgment of payment, or in other words a *receipt* for money. While in ſuch a ſtate it was no more a receipt than if the ſum profeſſed to be received were omitted. That in Rex v. Harriſon, the book in which the entry was made imported to be a book containing receipts for money received by the Bank from their cuſtomers, and therefore ſhewed that the money was received from the party to whom the book belonged.

Ante, 928.

Thomas's caſe, O.B. Sept. 1800, cor. Le Blanc J. MS. Jud

On an indictment on the ſtat. 2 G. 2. c. 25. for uttering forged receipts or acquittances for money, proof that the defendant (who was the repreſentative of one C. deceaſed, who had contracted with the Navy board,) produced forged receipts or vouchers, as if from the perſons employed by C., to ſupply the articles wanted, with intent to induce the board to paſs C.'s accounts, is an offence within the ſtatute; though the perſons whoſe receipts were ſo forged were only accountable to C., and not to the Navy board.

George Thomas was indicted for forging, and for uttering knowing to be forged, a variety of acquittances and receipts for money. The firſt count charged that the priſoner on, &c. feloniouſly did utter and publiſh as true a certain falſe, forged, and counterfeited *acquittance and receipt for money*, (to wit) for 3l. 12s., in the words, &c. following, (viz.) "Received the 8th of May 1794 of John Collinridge the "ſum of three pounds twelve ſhillings for wheelwright's "work for the honourable commiſſioners of his Majeſty's "navy.

"£. 3 : 12. William Clarke."

Alſo a certain other falſe, forged and counterfeited acquittance and receipt for money, to wit, for 1l. 5s., in the words, &c. following; (and ſo ſtated in like manner 22 other receipts of different dates, for different ſums, purporting to be ſigned by different perſons, as received of the ſaid John Collinridge;) with intent to defraud our Lord the King; he the defendant at the time of uttering, &c. well knowing the ſame to be falſe, forged, and counterfeited, againſt the ſtatute, &c. There was a ſecond count for uttering, &c. one acquittance and receipt only (ſetting it out) with the like intent; and a third count for forging and counterfeiting the ſame acquittance and receipt (ſetting it out) with the like intent, againſt the ſtatute, &c.

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Before the caſe was opened on the part of the proſecution, the priſoner's counſel applied to the Court that the proſecutor might be put to elect on which of the ſeveral receipts ſtated in the firſt count he would proceed, and might be reſtrained from proceeding on more than one. But Le Blanc J. denied the application, as the receipts were charged to have been uttered at one and the ſame time, and might conſtitute only one offence of uttering many forged receipts (*a*). And accordingly it was proved that the ſeveral receipts there ſtated were forged, and were uttered at one and the ſame time, in one bundle, by the priſoner, by his giving them in to the ſolicitor of the navy board as vouchers to verify an account of the expenditure of one Collinridge, a public accountant deceaſed, for the purpoſe of getting ſuch account paſſed at the navy board. And the jury found him guilty of the whole.

On a count for uttering ſeveral of ſuch forged receipts, the Court will not put the proſecutor to his election on which receipt to proceed, if they be all uttered at the ſame time.

An objection was then ſtated by the priſoner's counſel, that the forging or knowingly uttering the receipts in queſtion was not under the circumſtances an offence within the meaning of the ſtatute 2 Geo. 2. c. 25. ſ. 1. as they purported to be receipts given to Collinridge by perſons employed by him, for money therein ſtated to have been paid to them for work and materials done and provided for the buſineſs in which he was employed under the navy board, and were produced by the priſoner as vouchers to accompany and verify Collinridge's accounts, in order to get them paſſed by the navy board; which accounts the priſoner had taken upon himſelf after Collinridge's death to get paſſed, in order to get rid of an extent which had iſſued againſt Collinridge's eſtate and effects. And it was urged in ſupport of the objection, that theſe workmen were ſolely employed by Collinridge and not by the navy board; and that he and not the navy board were anſwerable to them. That therefore the board had nothing to do with theſe receipts, and it was indifferent to the board whether theſe ſums had been paid to theſe ſeveral perſons or not (*b*).

(*a*) *Vide* R. v. Young and others, 3 Term Rep. 98.

(*b*) The fact here aſſumed in the terms of the objection did not appear upon the evidence. On the contrary, it was underſtood that Collinridge was employed as agent to the board, and was to be paid what ſums he had expended.

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Judgment being reſpited, in order to ſubmit theſe objections to the conſideration of the Judges, on the 6th of November 1800 they all [abſent Lawrence J.] held the conviction right; and that the receipts as ſtated were within the ſtatute. And they alſo agreed that the proſecutor was not bound to proceed on one receipt only.

Vide Jones and Palmer's caſe, poſt, f. 60. S. P.

Warrant or Order for Payment of Money or Delivery of Goods.

§ 37. It ſeems now ſettled that if the *warrant* or *order* mentioned in the ſtat. 7 Geo. 2. c. 22. do not purport on the face of it, or be ſhewn by proper averment, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulſory on the perſon having poſſeſſion of the ſubject-matter of it; but only purport to be a requeſt to advance the money or ſupply the goods on the credit of the party applying, which the other may comply with or not as he ſees proper, it is not a warrant or order within the ſtatute.

7 G. 2. c. 22. Ante, 923.

Rex v. Mary Mitchell, Kent, 1754, Foſt. 119. *A note in the name of an overſeer of the poor to a ſhopkeeper, deſiring him to let the priſoner have certain goods which he would ſee him paid for, is not a* warrant *or* order *(which are uſed as ſynonymous terms) for delivery of goods within the ſtatute.*

The defendant was indicted for uttering and publiſhing the following falſe, forged, and counterfeited warrant and order for the delivery of goods:

" Mr. Jefferys, Oct. 16th, 1753.

" I deſire you to let this woman have ſix yards of ordi-
" nary ſtuff, one pair of ſtockings, one ſhift, one apron,
" one handkerchief; and I will ſee it all paid for. Witneſs
" my hand,

" George May."

With intent to defraud W. Jefferys, &c.

The fact was, that the priſoner, pretending to be entitled to parochial relief in the pariſh of Maidſtone, went to the ſhop of Jefferys with the order, pretending to have brought it from May, the overſeer of the poor, and deſiring him to let her have the articles on the credit of it. Jefferys ſuſpecting the forgery had her ſecured. The priſoner was convicted; but Mr. Juſtice Foſter reſpited judgment on a doubt whether ſuch a writing were a warrant or order for the delivery of goods within the act; ſince if it had been genuine it would have amounted to no more than a requeſt from May for the delivery of the goods on his credit, and an undertaking on his part to ſee them paid for. And on a conference of the Judges in July 1754, nine of them were clearly

of

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of opinion that the writing was not a warrant or order for the delivery of goods within the act; conſidering that the words *warrant, or order*, as they ſtand in the act are ſynonymous, and import that the perſon giving ſuch warrant or order has or at leaſt claims an intereſt in the money or goods which are the ſubject matter of it, and has or at leaſt aſſumes to have a diſpoſing power over them, and takes on him to tranſfer the property or at leaſt the cuſtody of them to the perſon in whoſe favour ſuch warrant or order is made. And though this caſe muſt fall within the miſchief, yet in the conſtruction of an act ſo penal the ſtrict letter of it ought not to be departed from. One of the Judges doubted, but acquieſced. Another of them (Sir Sydney Stafford Smythe) diſſented from the majority; conſidering that the ſtat. 7 Geo. 2. was made on purpoſe to take in caſes which had not been provided for by the former act of the 2 Geo. 2., and therefore ought to receive a liberal conſtruction. That the word *order* was in daily uſe among traders in a larger ſenſe than was then contended for; extending to letters or meſſages between them, where one deſires the other to ſend him a quantity of goods in the way of trade, without pretending to have any intereſt in or diſpoſing power over them. That, had the order been genuine, and the goods delivered on the credit of it, May would have been liable, and Jefferys would have been defrauded. That therefore the caſe came within the miſchief and the words of the act. The remaining Judge was abſent. The priſoner was diſcharged.

George Williams was indicted for forging the following order for delivery of goods.

Williams's caſe, Southampton Sum. Aſſ. 1775, cor. Nares J. MS. Crown Caſ. Reſ. and MS. Gould J. (Serjt. Forſter's MS. and 1 Leach, 134. S. C.)

" Monday, 3 July 1775.

" Sir,

" Pleaſe to let the bearer Capt. Geo. Williams have 12 " barrels of tar; and in ſo doing you'll oblige your humble " ſervant to command,

" To Mr. Guildmore, Wm. Robinſon.
" Goſport."

A note to a tradeſman to let the bearer have certain goods is no order for delivery of them within the ſtatute 7 Geo. 2 the writer having no previous intereſt in ſuch goods.

With intent to defraud H. Lys, J. S., and N. Guildmore.

It appeared that Robinſon, though a cuſtomer of Meſſrs. Lys and Co., was not the owner of or had any ſpecial intereſt in the goods in queſtion, or any others in their hands; nor had any authority to ſend any ſuch order, if it had been

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genuine. The priſoner was found guilty, but Nares J. reſpited judgment on the queſtion, whether this were an order within the ſtatute? And all the Judges (abſent De Grey C. J. and Willes J.) in Michaelmas term 1775, agreed that it was not within it, upon the authority of Mitchell's caſe: though moſt of them ſaid they ſhould have doubted the propriety of that determination had it been res integra: but having been ſo long acquieſced in, they thought it could not now be departed from.

Ellor's caſe, O. B. May 1784, 1 Leach, 363.

So, a note in theſe terms, "Meſſrs. Songer, pleaſe to "ſend £. 10 by the bearer, as I am ſo ill I cannot wait on "you. Eliz. Wery;" was holden not to be an order within the ſtatute.

Clinch's caſe, O. B Jan. 1791, cor. Perryn B. & Thomſon B. MS. Jud. (2 Leach, 611. S. C.) *An indictment ſtating an order to deliver goods, purporting to be ſigned by one who was alleged to be the ſervant of the owner, but not ſtating that ſuch ſervant had authority to make ſuch order, is bad.*

In Clinch's caſe the indictment, which was on the ſame ſtatute, for forging an order for the delivery of goods, ſtated in ſubſtance that on the 7th December 1790 James Lewis Deſormeaux, ſilk-dyer, delivered to Frances Purſer, ſilk-dyer, 78lb. of raw ſilk called Piedmont raw ſilk, of the goods and chattels of him the ſaid J. L. D., to be ſorted for dying; and that the priſoner well knowing the premiſes, feloniouſly forged, &c. a certain warrant or order for delivery of goods, with the name of L. Deſemockex thereunto ſubſcribed, purporting (*a*) to have been ſigned by one Lewis Deſormeaux, by the name and deſcription of L. Deſemockex, he the ſaid Lewis Deſormeaux then and there being the ſervant of the ſaid J. L. D. in his ſaid buſineſs of a ſilk-dyer, and purporting to be a warrant or order from the ſaid Lewis Deſormeaux as ſuch ſervant of the ſaid J. L. D. for the delivery of 8lb. of the ſaid raw ſilk, called, &c. parcel of the ſaid 78lb. &c. to the bearer of the ſaid warrant and order; the tenor of which, &c. is as follows;

"Pleaſe to ſend by the bearer 8lb. of that whorpe hun "market.

"L. Deſemockex."

With intent to defraud the ſaid J. L. D. &c. A 2d count was for uttering the ſame, and a 3d and 4th for forging and uttering it with intent to defraud Purſer.

The proſecutor J. L. D. was a ſilk-dyer in Spitalfields, with whom the priſoner had lived a fortnight before the tranſaction happened as a journeyman or under ſervant in the warehouſe, and James (the huſband of Frances) Purſer

(*a*) *Vide* poſt. ſ. 56.

was

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was another ſervant. The proſecutor's buſineſs was in general, but particularly in his abſence, under the direction of his ſon Lewis D., who was apprenticed to his father. On the 7th Dec. 1790 James Purſer delivered the 78 lb. of ſilk tied up in a bag to his wife, with directions to prepare it for dying. A few hours after, the priſoner called at Purſer's houſe and aſked for 8 lb. of the ſilk, ſaying that he had been ſent by Mr. Deformeaux to her for it, and producing at the ſame time the order in queſtion. Mrs. Purſer not knowing the perſon of the priſoner looked at the order, and aſked him who wrote it? To whom he replied, Mr. Lewis Deformeaux; and ſhe not knowing his hand-writing nor the manner in which he ſpelt his name, but believing the order to have come from him, knowing he had the management of this part of his father's buſineſs, delivered the 8 lb. of the ſilk unwarped to the priſoner, underſtanding the words of the order *bun market* to mean ſilk without the threads round it. It was proved that no ſuch order had ever been given either by the proſecutor or his ſon; and that the priſoner had converted the ſilk to his own uſe.

Several objections were urged on behalf of the priſoner; 1ſt, that to bring the offence within the act, the order muſt purport to be made by a perſon who had an authority, or at leaſt claimed an intereſt in the ſubject matter of it; and who takes upon him to transfer it to the perſon in whoſe favour the order is made. That it was not averred in the indictment that L. Deformeaux, whoſe order it purports and is averred to be, had any authority over or intereſt in the goods in queſtion, or any authority to make ſuch an order, which ought to have been expreſsly alleged. It ſtates that another perſon was the owner, namely the father J. L. D., to whom the ſon was only a ſervant; and it cannot be inferred from that circumſtance that the ſon had authority over the goods; and the want of ſuch an averment cannot be ſupplied by parol evidence: on the contrary the order appears to have been made by an apprentice who was not ſui juris and had no diſpoſing power. 2. That the inſtrument in queſtion was not an order but a bare requeſt. 3. That it was not directed to any perſon, and conſequently was not upon the face of it compulſory upon the holder of the goods. 4. That further it ought to have appeared on the face of the

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the indictment that the order was to the holder of the goods. The jury having found the priſoner guilty, judgment was reſpited to take the opinion of the Judges on theſe points; and on the 11th of May 1791 they held the conviction bad. The printed report ſtates that at the June ſeſſions following Mr. Baron Perryn, in delivering the opinion of the Judges, ſtated, 1ſt, that on the conſtruction of the ſtatute the forged warrant or order for the delivery of the goods muſt purport to be the order of the owner, or of ſome perſon who has or at leaſt claims an intereſt in, or who has or at leaſt aſſumes to have a diſpoſing power over the goods, and takes upon him to transfer the property or cuſtody of them to the perſon in whoſe favour ſuch order is made. For which he referred to Mitchell's caſe, Williams's caſe, and Jones's caſe. Again, that the order muſt be directed to the holder of or perſon intereſted in or having poſſeſſion of the goods. Now the order ſet forth in the indictment was not directed to any perſon whatſoever; but merely expreſſed a deſire that 8lb. of ſilk ſhould be delivered to the bearer of it, without any direction from whom it was to be received. On that ground therefore the Judges were of opinion that this was not a warrant or order within the ſtatute. 2dly, As to the form of the indictment, that it ought to have appeared in the indictment that the perſon whoſe name was ſubſcribed to the order had an authority to make it; but that could not be collected by any legal inference from the words of the preſent indictment; for L. Deſormeaux, the perſon whoſe name is forged, is ſtated to be the *ſervant* of the owner, which excludes every idea that he had or could claim any intereſt in the goods which were the ſubject of the order: it ought to have been expreſsly averred that he had authority to make it. That on this ground the Judges were of opinion that judgment muſt be arreſted.

2 Leach, 611.

Vide Seſſ. Pap. of June 9th, 1791.

(It is ſufficient however if the order on the face of it purport that the party making it had ſuch authority, though in truth he had it not; *vide* infra, and Mitchell's caſe, Foſt. 119.)

§ 38. *Order made by one who has no right.*

But if it purport to be an order which the party has a right to make; although in truth he had no ſuch right, and although no ſuch perſon exiſted in fact as the order purports to be made by, it falls within the penalty of the act.

Rex v. Lockett, O. B. June 1772, MS. Crown Caſ. Ref. 40 and MS. Buller J.

Charles Lockett was convicted of knowingly uttering a forged order for the payment of money in theſe words: "Meſſrs. Neale, Fordyce, and Down, pay to Wm. Hop-

"wood

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" wood or bearer £. 16 : 10 : 6. Rt. Venneſt." With intent to defraud John Scoles.

The caſe was, that the priſoner applied to Scoles a colourman, and agreed to purchaſe goods to the amount of £. 10 : 0 : 6, which he was to ſend for; and he took away with him a little Pruſſian blue. He came again, pretending to be in a hurry, and preſented this note, which he ſaid was a good one; and Scoles gave him 6l. 10s., being the difference. No ſuch perſon as Rt. Venneſt kept caſh with Meſſrs. Neale and Co.; nor did it appear that there was any ſuch man exiſting. The queſtion ſubmitted to the Judges was, whether this were an order within the ſtatute, being in the name of a fictitious perſon? the doubt ariſing on what is ſaid in Mitchell's caſe. The Judges after very long conſideration at laſt agreed in Trin. term 1774 that this was forgery. They thought it quite immaterial whether ſuch a man as Venneſt exiſted or not; or if he did, whether he had kept caſh at the banking houſe of Meſſrs. Neale and Co.: it was ſufficient that the order aſſumed thoſe facts, and imported a right on the part of the drawer to direct ſuch a transfer of his property.

(1 Leach, 110. S. C.) *A forged order on a banker for the payment of money, purporting to be made by one who kept caſh with him, is within the ſtatute, though made in a fictitious name, or in the name of one who had no authority to draw on him.*

A like caſe occurred in all its circumſtances in the April ſeſſions 1774, at the Old Bailey, in the caſe of one Abraham Abrahams, wherein judgment was reſpited, as Lockett's caſe was then undetermined. They were both decided at the ſame time, and the priſoners received judgment of death in the July following.

Abraham's caſe, O. B. April 1774. Serjt. Foſter's MS.

§ 39. *What is a ſufficient ſpecification of the goods.*

It does not appear neceſſary that the particular goods ſhould be ſpecified in the order, provided it be conceived in terms intelligible to the parties themſelves to whom ſuch order is addreſſed.

John Jones was indicted for forging an order for the delivery of goods to this purport; " Sept. 23d, 1764. Sir, " pleaſe to deliver my work to the bearer. Lydia Bell, " Fleet-ſtreet, London;" with intent to defraud the wardens and company of Goldſmiths.

Jones's caſe, O. B. 1764, cor. Smythe B. Lord Mansfield, and Bathurſt J. 1 Leach, 63. *Forging an order in the name of a ſilverſmith for redelivery of plate from Goldſmiths'-hall in theſe terms, " Pleaſe to deliver my work," is within the ſtatute.*

Mrs. Bell, a ſilverſmith, ſent ſeveral articles of plate to Goldſmiths'-hall to be marked. The form of the order was the ſame as is uſually ſent upon ſuch occaſions; except that in

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in ſtrictneſs and by the rule of the plate-office the ſeveral ſorts of work with the weight of the ſilver ought to have been mentioned in it. The fact of the forgery was proved; and the priſoner was convicted. And upon reference to the Judges, after a motion in arreſt of judgment, on the form of the order, the conviction was affirmed: but the priſoner was pardoned on condition of tranſportation.

M'Intoſh's caſe, O.B. Sept. 1800, cor. Le Blanc J MS. Jud. *"Pleaſe to pay to Y. &c. all my proportion of prize-money due to me for my ſervices on board," &c. ſigned in the name of a ſeaman on board the ſhip, is an order for payment of money or bill of exchange, the forgery whereof is felony. And this though the ſtat. 32 Geo. 3. c. 34. ſ. 2. enacts that no ſuch order made by any ſeaman diſcharged from the ſervice, and within ſeven miles of the port where his wages are payable at the time of ſuch order made, ſhall be good and valid, and ſufficient for receiving the money; and it appeared that the party whoſe name was forged was in fact in that predicament when the order bore date; but the order itſelf purported on the face of it to be made at another place beyond the limited diſtance.*

James M'Intoſh was convicted of forging, and uttering knowing to be forged, a certain order for payment of money in the words and figures following: "Petersfield, 6th Auguſt 1799. Sir, Pleaſe to pay on demand to Mr. Hugh Young or order all my proportion of prize-money, due to me for my ſervices on board his Majeſty's ſhip Leander, for which this ſhall be your authority. Witneſs my hand,

"John Johnſon,
X
his mark.

"To Alexr Daviſon Eſq.
"No. 21, Milbank-ſtreet, Weſtminſter.

"Signed before us,
"Walter Noble, miniſter.
"John Williams, } church-
"Francs Gibbons, } wardens."

In two counts it was called an order for payment of money; and in two other counts a bill of exchange; and it was ſtated to have been forged and uttered with intent to defraud John Johnſon. Four other counts charged the offence to have been committed with intent to defraud Alexander Davidſon.

The evidence of the priſoner having actually forged as well as uttered and received the money, viz. 14l. 10s. 6d. from the prize agent under the above order was clearly proved. But it was objected on the part of the priſoner, firſt, that this was not a bill of exchange, nor an order for payment of money, within the ſtat. 7 Geo. 2. c. 22.; becauſe no ſum of money was mentioned; and it was not certain that any money would be due to Johnſon. And ſecondly, that this inſtrument was void under the ſtat. 32 Geo. 3. c. 34. ſ. 2., which enacts, "that no letter of attorney or order "made or executed by any petty officer, ſeaman, &c. who "ſhall have been diſcharged from the ſervice of his Majeſty, "and who ſhall be at or within the diſtance of ſeven miles "from any of the ports where ſeamen's wages are paid for "ſuch

" ſuch ſervice at the time of making ſuch letter of attorney, " ſhall be good and valid, and ſufficient for receiving the " whole or any part of the wages, prize money, or other " allowances of money due or to grow due to ſuch petty " officer, ſeaman, &c. for ſuch ſervice; unleſs ſuch letter " of attorney or ſuch order ſhall be ſigned before and at- " teſted by a clerk of the treaſurer of the navy at ſuch port, " or by the inſpector of ſeamen's wills and powers of " attorney."

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It appeared from the evidence of Johnſon, whoſe name had been forged, and who had ſince been paid all his prize money by the agent, that at the time when the inſtrument bears date, viz. 6th Auguſt 1799, he was not diſcharged from his Majeſty's ſervice, but was on board a ſhip on his paſſage home from Minorca; and that he did not arrive at Portſmouth till the firſt of October, when he was diſcharged from the ſervice, and had ſince reſided in Scotland: this evidence put an end to the objection in point of fact. But after the cloſe of the ſeſſion a certificate was ſent to the learned Judge who tried the priſoner from the office for ſick and wounded ſeamen, which ſtated that John Johnſon was received on ſhore at Haſler from his Majeſty's ſhip Leander on the 3d of Auguſt 1799, and diſcharged out of the ſervice on the 5th of Auguſt 1799. The report of the priſoner's caſe was therefore deferred, in order that the opinion of the Judges might be taken, whether ſuppoſing the fact to have been that John Johnſon, the perſon whoſe name was forged, was diſcharged from the ſervice at the time the inſtrument bears date, and was within 7 miles of a port where ſeamen's wages were paid, the forging ſuch inſtrument not ſigned or atteſted according to the ſtat. 32 Geo. 3. c. 34. ſ. 2. would be felony? As alſo on the firſt point, whether it be either an order for payment of money or bill of exchange. The caſe ſtood over for conſideration; and afterwards the Judges held the conviction proper.

§ 40.

Inſtruments of other ſpecific denominations may be laid as warrants or orders, if in effect ſuch Ante, 940.

And even thoſe inſtruments which in the commercial world have peculiar denominations, yet if they fall within theſe terms and are in truth warrants or orders for payment of money, may be laid to be ſuch: of this Lockett's caſe before mentioned is an example.

In

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In Shepherd's caſe the form of the forged inſtrument was as follows: "Green-ſt. 31ſt July 1791. Sirs, Pray pay to "Mr. John Atkins or bearer the ſum of ſix pounds ſix "ſhillings, value received. Yours, &c. H. Turner. "Meſſrs. Brown, Collinſon, and Co. Lombard-ſtreet."

Rex v. Shepherd, O. B. Sept. 1781, MS. Crown Caſ. Reſ. 117. and MS. Gould and Buller Js. (1 Leach, 265. S. C.) *Vide* poſt, ſ. 50. S. C. more at large on another point *A bill of exchange may be laid as an order for payment of money. Vi.* 1 Bl R. 485.

Which was laid in the indictment to be an order for payment of money; and one of the objections was, that it ought to have been laid to be a bill of exchange, according to the caſe of Grant and Vaughan. But in Michaelmas term 1781, the Judges were unanimouſly of opinion that it was properly laid: and it was obſerved that the indictment and draft were the ſame as in Lockett's caſe, where all the Judges held the conviction proper; and that every bill of exchange ſeemed to be an order for payment of money, though not vice verſâ.

Willoughby's caſe, Warwick Lent Aſſ. 1783, *Vide* S. C. ante, tit. Larceny, &c. p. 581, 2. MS. Crown Caſ. Reſ. MS. Gould and Buller Js. and MS. Jud. *A bill of exchange or banker's draft may be charged as an order for payment of money.*

In Willoughby's caſe mentioned in another place the following inſtrument, which had been ſtolen out of a letter, was laid in the indictment and holden to be a warrant for payment of money.

"Poſt Bill.

"No. 6127. Birmingham, 13 Feb^ry 1783.

"Sir Wm. Lemon, Bt. and Co. Bankers, London,

"Pay 5 G^as to Mr. Richd. Moore or bearer, on de-
"mand, value received.

"Rece^d 5 G^as Robt Coales.
"Ent^d R. Moore."

After conviction, this was contended not to be a warrant for payment of money, but a note or bill of exchange, which are mentioned in the ſtat. 2 Geo. 2. c. 25. the omiſſions in which the ſtat. 7 Geo. 3. c. 22. on which the indictment was framed, was meant to ſupply. But in Eaſter term 1783 (*a*) the Judges all finally concurred in opinion that the indictment

(*a*) Upon adverting to the ſtat 7 Geo. 2. c 22 I find that Mr. Juſtice Buller's obſervation on it in the note of his own opinion before given in p. 581, 2. upon this caſe is not quite accurate; for he laid ſtreſs upon the words "*other* warrant," which he ſuppoſed to be uſed in the act, as ſhewing that the legiſlature muſt have intended ſome *other* warrant for payment of money than a bill of exchange: but no ſuch words are to be found in the act coupled together; though perhaps a ſimilar argument may be drawn from the true wording of it; for it enumerates ſpecific inſtruments, amongſt others, *bills of exchange*, as included in the ſtat. 2 Geo. 2. which it recites; and further recites that *no puniſhment is inflicted by the ſaid*

indictment was well laid; for though it was a bill of exchange, it was also a warrant for the payment of money; it was, if genuine, a voucher to the bankers or drawees for the payment.

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§ 41. *Not confined to commercial transactions.*

It appears from the case of M'Intosh before mentioned that the statute is not confined to commercial transactions. This was once pressed and overruled in the case of George Graham, who was indicted and convicted for forging an order for payment of money, which appeared to be an order of a justice of peace for the county of Middlesex upon the high constable of a division, or the treasurer of the county, to pay a reward of 10s. to the prisoner for the apprehension of a vagrant under the stat. 17 Geo. 2. c. 5. s. 5. Another objection however which was there taken seems to have been entitled to a different consideration from what it is stated to have received, namely, that the 18th s. of the stat. expressly subjects the party forging such an order to a penalty of 50l. which was contended to be a repeal as to such orders of the prior stat. 7 Geo. 2. The prisoner was notwithstanding convicted and received judgment. But the jury recommended him to mercy (*a*). A similar objection to the last was made and prevailed in the case of Davies, upon the acts against deer stealing.

Ante, 942. R. v. Graham, O. B. Oct. 1778, cor. Blackstone J. and Eyre B. and the Recorder Serjt Forster's MS.

Ante, 609. But see stat. 42 G. 3 c. 107. since passed.

§ 42. *Banker's notes, &c.*

Besides the general acts of the 2 & 7 Geo. 2. already mentioned, respecting the forgery of bills of exchange and promissory notes, &c. further provision has been made with respect to securities of this nature in the case of bankers using certain printed forms of such securities, or paper of a particular description.

The stat. 41 Geo. 3. c. 57. intitled "an act for the better prevention of the forgery of the notes and bills of exchange of persons carrying on the business of bankers," reciting that whereas it is expedient to prevent the crime of forgery in all parts of the united kingdom of Great Britain

41 G. 3. (U. K.) c. 57. *Making, &c. frame or mould for making paper, with the name or firm of any banker subsisting in the jus-*

said act on such as forge *any warrant or order for payment of money*, &c. which, according to his argument, must therefore mean something else than a bill of exchange, such, he observed, as warrants from some of the public boards for payment of money, which were specific things differing from bills of exchange, &c.

(*a*) Qu. What became of the case?

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and Ireland, it is enacted, "That if any perſon or perſons "in any part of the united kingdom of Great Britain and "Ireland (after the 10th of July 1801) ſhall make, or cauſe or "procure to be made, or knowingly aid or aſſiſt in the making "or uſing of any frame, mould, or part of any frame or "mould, for the making of paper, with the name or firm "appearing viſible in the ſubſtance of the paper, of any "perſon or perſons, body corporate, or other banking com-"pany or partnerſhip, carrying on the buſineſs of bankers, "without an authority in writing for that purpoſe from "ſuch perſon or perſons, body corporate, or other banking "company or partnerſhip, or from ſome perſon or perſons "duly authoriſed to give ſuch authority; or ſhall manufac-"ture, make, vend, expoſe to ſale, publiſh, or diſpoſe of, or "cauſe or procure to be manufactured, made, vended, or "expoſed to ſale, publiſhed, or diſpoſed of, any paper having "the name or firm, appearing viſible in the ſubſtance of the "paper, of any perſon or perſons, body corporate, or other "banking company or partnerſhip whatſoever, carrying on "the buſineſs of bankers; or if any perſon or perſons, with-"out ſuch authority, ſhall by any art, means, myſtery, or "contrivance, cauſe or procure, or ſhall knowingly aid or "aſſiſt in cauſing or procuring, the name or firm of any "perſon or perſons, body corporate, or other banking com-"pany or partnerſhip, carrying on the buſineſs of bankers, "to appear viſible in the ſubſtance of the paper whereon "the ſame ſhall be written or printed; every perſon or per-"ſons ſo offending in any of the caſes aforeſaid, and being "convicted thereof, ſhall for the firſt offence be impriſoned "for any time not exceeding two years, nor leſs than ſix "months; and for the ſecond offence be tranſported to "any of his Majeſty's colonies or plantations for 7 years."

ſtance of it, without authority for that purpoſe; or vending or expoſing to ſale, &c. ſuch paper; or by any means procuring, &c. ſuch name or firm ſo to appear viſible in the ſubſtance of any paper whereon the ſame ſhall be written, &c. two ye rs impriſonment for firſt offence, and for ſecond offence tranſportation for ſeven years.

The like puniſhments for engraving, &c. without authority any bill or note of any banker, or uſing plate ſo engraved; or knowingly having ſuch in cuſtody, or uttering, &c. ſuch bill, &c.

(Sect. 2.) enacts, "That if any perſon or perſons, in any "part of Great Britain and Ireland (after the 10th of July "1801) ſhall engrave, cut, etch, ſcrape, or by any other "means make, or ſhall cauſe or procure to be engraved, "&c. or by any other means or device made, or ſhall "knowingly aid or aſſiſt in the engraving, &c. or by any "other means or device making, in or upon any plate "whatſoever, any bill of exchange, promiſſory note, or "other note for the payment of money, or part of any "bill of exchange, promiſſory note, or other note for the

"pay-

Ch. XIX. § 42. *By ſtat.* 41 G. 3. c. 57. *Of Bankers notes, &c.*

" payment of money, purporting to be the bill of exchange, " promiſſory note, or other note for the payment of money, " of any perſon or perſons, body corporate, banking com- " pany or partnerſhip, carrying on the buſineſs of bankers, " without an authority in writing for that purpoſe from " ſuch perſon or perſons, body corporate, banking company, " or partnerſhip, or ſome perſon or perſons duly authoriſed " to give ſuch authority; or ſhall uſe any ſuch plate ſo en- " graved, cut, etched, ſcraped, or by any other means or " device made, or ſhall uſe any other device for the making " or printing any ſuch bill of exchange, promiſſory note, or " other note for the payment of money, without ſuch au- " thority in writing as aforeſaid: or if any perſon or perſons " ſhall (after the ſaid 10th of July 1801), without ſuch au- " thority as aforeſaid, knowingly have in his her or their " cuſtody any ſuch plate or device, or ſhall without ſuch " authority as aforeſaid knowingly and wilfully publiſh, " diſpoſe of, or put away, any ſuch bill of exchange, pro- " miſſory note, or other note for the payment of money, or " part of ſuch bill of exchange, promiſſory note, or other " note for the payment of money; every perſon ſo offend- " ing in any of the caſes aforeſaid, and being convicted " thereof, ſhall for the firſt offence be impriſoned for any " time not exceeding two years nor leſs than ſix months, " and for the ſecond offence be tranſported to any of his Ma- " jeſty's colonies or plantations for the term of ſeven years."

Engraving, &c. on plate any ſubſcriptions ſubjoined to any bill, &c. of any bankers payable to bearer on demand, purporting to be the bill, &c. of ſuch bankers; or knowingly having ſuch plate in poſſeſſion, &c. for firſt offence impriſonment (from 12 months to 2 years), and for ſecond offence tranſportation for ſeven years.

(*a*) Miſprinted for *on.*

Sect. 3. enacts, " That if any perſon or perſons in Great " Britain and Ireland (after the 10th of July 1801) ſhall en- " grave, cut, or etch, or by any other means or contrivance " trace with a hair ſtroke or other mode of delineation " or (*a*) any plate whatſoever any of the ſubſcriptions ſub- " joined to any bill of exchange, promiſſory note, or other " note for the payment of money, of any perſon or perſons, " body corporate, or other banking company, or partnerſhip " carrying on the buſineſs of bankers, to be payable to " bearer on demand; or ſhall have in his her or their poſ- " ſeſſion any plate with the hair ſtrokes or other delineation " of any ſubſcription traced thereon, ſubjoined to any bill of " exchange, promiſſory note, or other note for the payment " of money, purporting to be the bill of exchange and pro- " miſſory note, or other note for the payment of money, of " any perſon or perſons, body corporate, or other banking

Ch. XIX. § 42. *By ſtat.* 41 G. 3. c. 57. *Of bankers notes, &c.*

" company or partnerſhip, carrying on the buſineſs of " bankers, and to be payable to the bearer on demand, and " ſhall not be able to prove that ſuch plate came into his her " or their poſſeſſion without his her or their knowledge or " conſent; every perſon ſo offending in any of the caſes " aforeſaid, and being convicted thereof, ſhall for the firſt " offence be impriſoned for any time not exceeding three " years, nor leſs than twelve months; and for the ſecond " offence be tranſported to any of his Majeſty's colonies or " plantations for the term of ſeven years."

§ 43. ## IV. *How far the Validity in Law of the Thing forged, ſuppoſing it were genuine, is eſſential to Forgery.*

2 MS. Sum. 347. 1 Hawk. ch. 70. ſ. 7.

It is ſaid to be no way material whether a forged inſtrument be made in ſuch a manner as, were it true, it would be of any validity or not. But this I conceive muſt be underſtood where the falſe inſtrument carries on the face of it the ſemblance of that for which it is counterfeited, and is not illegal in its very frame. Upon this ground it has been adjudged that the forgery of a protection in the name of one as being a member of parliament, who in truth was no member at the time, is as much an offence at common law as if he were ſo.

R. v. Deakins, 1 Sid. 142.

Japhet Crooke's caſe, ante, 921. *And vide* King's caſe, 1 Keb. 803 & 3 Keb. 51.

In Japhet Crooke's caſe before mentioned, who was indicted upon the ſtat. 5 Eliz. c. 14. where the conveyance deſcribed the eſtate intended to be affected by a wrong name: and was therefore conſidered to be ineffectual at law, if genuine, to paſs the property intended, (though ſome of the Judges thought that equity would have decreed a proper conveyance,) yet the forgery was holden to be indictable upon the ſtatute.

Coogan's caſe, O. B. 1787. MS Buller J. (2 Leach, 503. S. C.)

Coogan was indicted (*a*) and convicted for knowingly publiſhing as true, &c. a certain falſe will and teſtament of one James Gibſon, late a ſeaman belonging to a merchant

(*a*) It is obſerved in 2 Leach, 503. that the indictment was framed on the ſtat. 2 Geo. 2. c. 25. and not on the ſtat. 31 Geo. 2. c. 10. ſ. 24. which is confined to ſeamen on board the king's ſhips. This laſt ſtatute has the words "*laſt* will," the other the word "*will*" only.

veſſel,

veſſel, &c. The fact was clearly proved, but it appeared that J. G. was *living:* and therefore it was objected that the caſe was not within the ſtatute, inaſmuch as during the life of the party his will was ambulatory, and could have no validity as a will till his death; and ſo could not properly be called the laſt will and teſtament of J. G.; and there cannot be a forgery of a thing which neither did nor could exiſt at the time of the forgery. But in Michaelmas term 1787 all the Judges held the conviction proper. It was ſufficient, they conſidered, that it purported on the face of it to be a will. That the objection was only applicable to the effect which a will has in law, and not to the fact of making it. It was obſerved then, and afterwards more largely at the time of delivering the opinion of the Judges on the caſe, that every will muſt be made in the lifetime of the party whoſe will it was. It exiſted as a will in his lifetime, though not to take effect till his death: and that the making a falſe inſtrument importing on the face of it to be a will was equally forgery whether the perſon whoſe will it purported to be were dead or alive at the time of making it. That a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it ſo. Buller J. thought that the very definition of forgery decided the doubt, for it was the making a falſe inſtrument with intent to deceive. That here the intention to deceive had been eſtabliſhed by the jury, and the inſtrument purporting to be a will was clearly falſe. Alſo ſeveral expreſs authorities were referred to, where the forgery was holden to be committed during the life of the perſon whoſe will the forged inſtrument purported to be. In 3 Inſt. 170. it is laid down that if one who writeth the will of a ſick perſon inſerteth therein a clauſe concerning the deviſe of lands falſely, without any warrant or direction of the deviſor; albeit he did not forge or falſely make the whole will, yet he is puniſhable by the ſtat. 5 Eliz. c. 14., the words of which are the ſame to this purpoſe as the ſtatute in queſtion: and it is apparent that in ſuch a caſe the forgery muſt be committed during the life of the perſon whoſe will it purports to be. Again, in the caſe of Timothy Murphy, who was

Ch. XIX. §43. *Validity in law of the thing forged, if genuine.*

Forging the will of a perſon living is a capital offence within the ſtat.

(R. v. Murphy, 10 St. Tr. 183.)

Ch. XIX. § 43. *Validity in law of the thing forged, if genuine.*

tried at the Old Bailey in January 1753, upon a ſtatute ſimilar to the 31 Geo. 2. c. 10. for forging a ſeaman's will who it appeared was ſtill alive, and had returned to England two years after the prize money had been received by the priſoner under the forged will; he was convicted without any queſtion or doubt. So alſo in Rex v. Sterling, Mrs. Shutter, whoſe hand-writing to her ſuppoſed will was forged by the priſoner, appeared in court at the trial, and gave evidence, and the priſoner was convicted and hanged. The priſoner Coogan in conſequence received ſentence of death at the Seſſions in June 1787.

(R. v. Sterling, O. B. Sept. 1773. (*a*).)

Vide 2 Leach, 505.

Upon the ſame principle have all thoſe caſes turned which will be particularly conſidered under the next head of inquiry, where different inſtruments have been forged in the names of perſons who had no exiſtence, and which conſequently could by no poſſibility have any legal operation; becauſe upon the face of them they purported to be valid inſtruments.

§ 44. *Degree of ſimilarity between the true and counterfeit inſtrument.*

I have before had occaſion to remark, that in order to conſtitute forgery it is not neceſſary there ſhould be a perfect reſemblance between the falſe inſtrument and that which is intended to be imitated: if they be ſo far alike that the deception is calculated to impoſe upon perſons in general it is ſufficient; though it would not impoſe on perſons having particular experience in ſuch matters. This was ſo ruled in a very late caſe by Le Blanc J. upon an indictment againſt one Hooſt for forging, &c. bank notes. A perſon from the Bank, by whom the forgery was proved, ſaid, that he could not have been impoſed upon by the counterfeits, the difference between thoſe and the true notes being to him ſo ap-

R. v. Hooſt, Exeter Sp. Aſſ. 1802, MS.

(*a*) In the printed report of this caſe, 1 Leach, 117. it is noted that the probate was not recalled at the time of the trial. This was obſerved with reference to the caſe of R. v. Vincent, as reported in 1 Stra. 481. (and *vide* the ſame book, 671. and R. v. Rhodes, ib. 703. and 1 Wilſ. 75.) where on an indictment for forging a will of perſonal eſtate the probate was holden to be concluſive evidence in ſupport of the will. But ſee the obſervations made on Vincent's caſe by the counſel for the proſecution in the caſe of the Ducheſs of Kingſton, 11 St. Tr. 222, 3. &c. and the caſes there oppoſed to it.

parent

parent in ſeveral particulars pointed out by him. But in the ſame caſe it appeared that others had been deceived at firſt by them, though the counterfeits were very ill executed.

Ch XIX. § 44. *Validity in law of thing forged, if genuine.*

James Elliot was indicted for forging the following note:

Elliott's caſe, Maidſtone 1777, MS. Crown Caſ. Reſ. 84. Serjt. Foſter's MS. (1 Leach, 210. S. C.) *A counterfeit Bank note without the water-mark is a forged promiſſory note for the paymen' of money within the ſtats. 2 G. 2. c. 25. & 31 G. 2. c. 22. though the word* Pounds *be omitted in the body of it, which was ſupplied by the "£. Fifty" in the margin.*

"No. 17. 73.

"I promiſe to pay Mr. Joſ. Crook or bearer, on de-
"mand, the ſum of Fifty

"London, 20 June 1775.

"£. Fifty. For the Govr & Company of the Bank of England.

"Entd C. Blewart. Thos Thompſon."

In ſome of the counts the inſtrument was ſtated to be a bank note, in others a note in the form of a bank note; but the 5th count, which was the one relied on, and on which the queſtion turned, charged that the priſoner feloniouſly forged, &c. "a certain promiſſory note for the payment of "money, with the name of Thomas Thompſon thereto ſub-"ſcribed, purporting to bear date, &c. and to have been "ſigned by one Thomas Thompſon for the governor and "company of the Bank of England for the payment of 50l. "to Mr. J. C. or bearer on demand, (the tenor of which "was ſet forth as above), with intent to defraud the gover-"nor and company of the Bank of England."

It appeared in evidence that the note in queſtion both in paper and print much reſembled a real bank note, but that in the fabrick of the paper, which was rather thicker than the bank paper, there was wanting what is called the water-mark, namely the words "Bank of England;" that the number was not filled up; and that in the body of the note the promiſe was only to pay the ſum of "fifty," the word "pounds" not being added in writing, as is uſually done in ſuch notes as have not the word *pounds* engraved therein, being calculated for the inſertion of broken ſums; but at the bottom of the note there was engraven £.50. The fact of the forgery was brought home to the priſoner, though the note was never publiſhed, it having been found in his poſſeſſion at the time he was ſeized; and he was convicted. But on theſe circumſtances it was urged that this was not a note reſembling a bank note for want of the water-mark;

Ch. XIX. § 44. *Validity in law of thing forged, if genuine.*

neither was it a note for fifty *pounds*, as the word *pounds* was not inserted: and on these doubts judgment was respited for the opinion of the Judges; who in Michaelmas term 18 Geo. 3. were clearly of opinion that the conviction was proper. For first, in forgery there need not be an exact resemblance; it is sufficient that the instrument is primâ facie fitted to pass for a true one. Secondly, the major part inclined to think that the omission of *pounds* in the body of the note, had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the jury, as was done in this case, whether it purported to be a note for 50l. or any other sum; but all agreed that the £.50 in the margin removed every doubt, and shewed that the *fifty* in the body of the note was intended for *pounds*.

(Absent De Grey C. J. and Smythe C. B.)
Vide ante, f. 6.

§ 45. *The counterfeit must substantially and essentially answer the description in the indictment of the instrument alleged to be forged.*

But though a similarity to a common intent be sufficient, yet it is necessary that the forged instrument should in all essential parts have upon the face of it the similitude of a true one; so that it be not radically defective and illegal in the very frame of it.

Jones's case, ante, 883.

In Jones's case one set of counts laid the forged instruments to be a paper writing purporting to be *a bank note*. In another set it was charged as purporting to be a promissory note for payment of money. The note was, "I promise "to pay *for self and company of my bank in England*," &c. without any signature; and the court of B. R. held clearly that the prisoner was entitled to an acquittal.

Fawcett's case, ante. 862.

So one of the objections in Fawcett's case was, that the instrument forged (which was an order in the name of a creditor to the gaoler for the discharge of a debtor who was in prison under an attachment for a contempt) was a mere nullity in itself, even if genuine: though it does not appear whether the Judges decided the case on that ground: for at any rate the indictment was holden good as for a cheat.

Reading's case, post, f. 56.

In Reading's case the bill was directed to John *Ring*, and the acceptance was by *John King*. The indictment stated that the bill purported to be directed to John *King* by the name of John *Ring*, and that the prisoner forged the acceptance in the name of John King; but judgment was arrested because *Ring* could not purport to be *King*.

Ante, 938.

Yet it seems that a mere literal mistake in the framing of the instrument itself, if well laid in the indictment, will make

no

Ch. XIX. § 45. *Validity in law of thing forged, if genuine.*

no difference. In Clinch's case, where the prisoner in forging an order for the delivery of goods blundered in spelling the name of *Desmockex* instead of *Deformeaux*, no stress was laid on this, though on other grounds the indictment was holden bad.

R v. Fitzgerald and Lee, O. B. Sept. 1741, 1 Leach, 24.

Fitzgerald and Lee were indicted for forging the will of *Peter* Perry, late a seaman on board his Majesty's ship Lancaster, with intent to defraud the King. The will began, "I *Peter* Perry," and ended

his
"John ⋈ Perry,
mark."

It appeared in evidence that Fitzgerald had carried the will to the proper officer, who on observing the difference of the christian names required him to account for the error before the probate could be granted. He accordingly produced the other prisoner Lee; who in the name of Welch swore that he was one of the subscribing witnesses: that the name of the deceased was *Peter* Perry, who had made his mark to and delivered the will: that he Welch had by mistake written the name of *John* instead of Peter; upon which the probate was granted. It was objected that this was no forgery of the will of PETER Perry as laid in the indictment; and the case was reserved for the opinion of the Judges, and considered by them in Michaelmas term 15 Geo. 2. Their opinion was never publicly delivered; but the prisoners were afterwards executed pursuant to their sentence.

Wall's case, Worcester Sp. Ass. 1800, cor. Thomson B. MS. Jud.

But where Thos. Wall was convicted upon an indictment for forging and knowingly uttering a will of land (*a*) of one John Skidmore deceased, attested by only two witnesses; and it did not appear in evidence (*b*) what estate the supposed testator

(*a*) The will set out was of this tenor: "Dec. 6th, 1795. I John Skidgmer "give and bequeath to Thos. Wall all the said premises belonging to the said "John Skidmer which he baut of the said Thos. Wall and Sarah Hasten. He "pays rent so long as mee and my wife lives, and at our deces he shall have all "the said premises again. He shall not mortgeg nor sell the said premises so "long as he lives, to be left to his children if the be the longest livers, or eles to "the nereſt friend he has—John Skidmore—

"Witness my hand, John Cobett and Richd. Wall."

(*b*) It was suggested to be only leasehold, but no proof was given of it. Skidmore died in August 1794 without issue, and his widow died in 1795; after whose death

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teſtator had in the land ſo deviſed, or of what nature it was; wherefore it might be preſumed to be freehold, and therefore the will void and of none effect by the expreſs enactment of the ſtatute of frauds, (29 Car. 2. c. 3. ſ. 5.) for want of the atteſtation of three witneſſes; the Judges on conference in Eaſter term 1800 held the conviction wrong; for as it was not ſhewn to be a chattel intereſt, it was to be preſumed to be freehold. The following caſe was referred to as decided upon the ſame principle.

There can be no forgery of a will of land atteſted only by TWO *witneſſes.*

Moffatt's caſe, O. B. Jan. 1787, MS. Buller J. (2 Leach, 483. S. C.) *Forgery of a* bill of exchange, *as ſuch, cannot be committed, where it is drawn for more than* 20 *s. and leſs than* 5 *l. without mentioning the place of abode of the payee and having a ſubſcribing witneſs thereto, being in ſuch caſe declared abſolutely* void *by ſtat.* 17 Geo. 3. c. 30.

John Moffatt was indicted for knowingly uttering as true a forged acceptance, purporting to be the acceptance of Geo. Peters on a bill of exchange, the tenor of which was as follows:

" Navy Office, 21ſt Dec. 1786.

" Sir, Seven days after date pleaſe to pay to Mr. John " Moffatt or his order £. 3 : 3. and place the ſame to the " account of, &c. Walter Stirling.

" To George Peters Eſq. Bank of England.

" Acc[d] George Peters."

with intent to defraud W. Ball.

The bill produced agreed with the indictment. But the queſtion was whether this amounted to forgery, the bill in queſtion not ſpecifying the place of abode of the payee, nor being atteſted by any ſubſcribing witneſs; under which circumſtances the bill being for leſs than 5 l. is by ſtat. 17 Geo. 3. c. 30. ſ. 1. declared to be void; and after conviction all the Judges in Hilary term 1787 held the conviction wrong: for if it had been a genuine inſtrument, it would have been abſolutely void, and nothing could have made it good. And ſince the ſtatute ſuch an inſtrument is no bill, and has not the appearance or ſemblance of one. And this was diſtinguiſhed, on the conference, from Hawkeſwood's caſe after mentioned, where the holder of the bill had a right to get it ſtamped, and the ſtamp-act only ſays that it ſhall not be uſed in evidence till ſtamped.

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death the priſoner, who was then in poſſeſſion as tenant to Skidmore of ſome ſmall premiſes at the rent of about 30 *s.* per ann. (of which premiſes he had formerly been the owner, applied to one Joſeph Buſton, who had married a niece of the widow, to continue tenant to him at the old rent; to which Buſton agreed. And in Sept. 1798 the priſoner produced and proved the will in queſtion in the eccleſiaſtical court at Worceſter; on which adminiſtration with the will annexed was granted to him as univerſal legatee.

Ch. XIX. § 45. *Validity in law of thing forged, if genuine. Stamps.*

Hawkeſwood was indicted for forgery of a bill of exchange; and objection was taken that not being ſtamped it was no bill of exchange by ſtat. 22 Geo. 3. c. 33. and prior acts: and that this was an objection apparent upon the face of it; and no perſon could be deceived or defrauded thereby, unleſs he took it without looking at it, which would be groſs negligence. But as the ſtamp act was merely a revenue law, and did not purport in any way to alter the crime of forgery; and as the falſe inſtrument had the ſemblance of a bill of exchange, and was negotiated by the priſoner as ſuch; Buller J., before whom he was tried, over-ruled the objection, but reſpited judgment. And in Eaſter term 1783 all the Judges were of opinion that the priſoner was properly convicted: for the ſtamp act in ſaying that a bill without a ſtamp ſhall not be pleaded or given in evidence, or be available in law or equity, means only that it ſhall not be made uſe of to recover the debt: and beſides, the holder might get it ſtamped after it was made.

Hawkeſwood's caſe, Worceſter Sp. Aſſ. 1783, MS. Buller J. and MS. Crown Caſ. Reſ. 140. (1 Leach, 292. (S. C.) *Forgery may be committed of a bill of exchange on unſtamped paper.*

The above caſe was confirmed in Rex v. Morton, which was an indictment for knowingly uttering a forged promiſſory note, as it appeared at the trial, on unſtamped paper. The caſe underwent much conſideration, and was debated by the Judges in Michaelmas term 1795, and in Hilary and Eaſter terms 1796, on the principal point, as well as upon the queſtion, whether the ſtat. 31 Geo. 3. c. 25. ſ. 19., which paſſed after Hawkeſwood's caſe, and prohibits the ſtamp to be affixed afterwards, had made any difference. And though two or three of the Judges doubted at firſt the propriety of Hawkeſwood's caſe if the matter were res integra, yet they all agreed that being an authority in point they muſt be governed by it; and that the ſtat. 31 Geo. 3. c. 25. ſ. 19. made no manner of difference in the queſtion; for that the only thing to be regarded was the ſtate of the note at the trial, and not what might be its ſtate afterwards. And moſt of the Judges maintained the principle of Hawkeſwood's caſe to be well founded: for they held that the acts of parliament which had been referred to and relied on, being mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the inſtrument ſhould not be available for the purpoſe of recovering on it in a court of juſtice; but it might be received in evidence for a collateral pur-

Morton's caſe, York Sum. Aſſ. 1795, MS. Jud. *Forgery may be committed of a promiſſory note on unſtamped paper even ſince the ſtat. 31 Geo. 3. c. 25. ſ. 19. which prohibits the ſtamp to be affixed afterwards.*

Ch. XIX. § 45. *Validity in law of thing forged, if genuine Stamps.*

purpoſe: and inſtances of this might occur under the 6th ſect. of the ſtat. 31 Geo. 3. by which perſons drawing bills on unſtamped paper were chargeable with the duties; and alſo under the 10th ſect. of the ſame act, by which they are made liable to a penalty of 20l, in both which caſes the note or bill muſt be uſed in evidence. That it was not neceſſary to conſtitute forgery that the inſtrument ſhould be available That though a compulſory payment by courſe of law could not have been inforced for want of the proper ſtamp, yet a man might equally be defrauded by a voluntary payment being loſt to him. That if this were a ſufficient defence, forged ſecurities might be publiſhed on improper ſtamps with impunity; which would carry the miſchief to an alarming extent. That the ſtamp itſelf might be forged; and it would be a ſtrange defence to admit in a court of juſtice that becauſe a man had forged the ſtamp he ought to be excuſed for having forged the note itſelf; which would be ſetting up one fraud in order to protect him from the puniſhment due to another.

2 Leach, 811.

The deciſion in this caſe determined two others under the like circumſtances, Rex v. John Roberts alias Colin Reculiſt, tried before Thomſon B. at the O. B. January 1796, and Rex v. Charles Davies, before Groſe J. Surry ſpring aſſizes 1796. And the ſame principle was again recognized in Teague's caſe in Mich. term 1802.

Poſt. f. 55.

In truth if the matter be duly conſidered, the words of the ſtamp acts before mentioned can only be applicable to a true inſtrument; for a forged inſtrument, when diſcovered to be ſuch, never can be made available though ſtamped. The acts therefore can only be underſtood as requiring ſtamps on ſuch inſtruments as were available without a ſtamp before thoſe acts paſſed, and which would be available afterwards with a ſtamp.

Invalidity of the inſtrument muſt appear on the face of it to found an objection.

M'Intoſh's caſe, ante, 942.

It is alſo clear that it is no objection to the charge of forgery that the inſtrument is not available by reaſon of ſome collateral objection not appearing upon the face of it; as in M'Intoſh's caſe before mentioned, where the order for payment of prize money bore date at a period when the ſeaman whoſe name was forged was in fact within ſeven miles of the port where he was diſcharged, and where his wages, &c. were payable; in which caſe it is declared by ſtat. 32 Geo.

Geo. 3. c. 34. ſ. 2. that no ſuch order ſhall be valid; the order itſelf purporting to bear date at a more diſtant place.

Ch. XIX. § 45. *Validity in law of thing forged, if genuine.*

V. *How far uſing a fictitious Name, or perſonating the true Man or fictitious Character aſſumed at the Time, will affect the Offence.* § 46.

Firſt, It is a clear propoſition that the making of any falſe inſtrument which is the ſubject of forgery with a fraudulent intent, although in the name of a non-exiſting perſon, is as much a forgery as if it had been made in the name of one who was known to exiſt, and to whom credit was due.

The priſoner was indicted on the ſtat. 2 Geo. 2. c. 25. for knowingly uttering a forged deed, purporting to be a power of attorney from Elizabeth Tingle, adminiſtratrix of her father Richard Tingle deceaſed, late a marine belonging to his Majeſty's ſhip Hector, to F. P. of, &c. impowering him to receive prize money, &c. The priſoner was convicted on clear evidence of the fact; but it appearing that R. Tingle had died childleſs, a doubt was conceived whether, as there was no ſuch perſon exiſting as Elizabeth Tingle the caſe amounted to forgery? The doubt aroſe on the paſſage in the 3 Inſt. 169. where Lord Coke ſays, that forgery is properly taken *when the act is done in the name of another perſon.* But in Trinity term 1754 eleven of the Judges were very clearly of opinion that the caſe was within the letter and meaning of the act, which in deſcribing this offence ſpeaks only of a falſe deed, and does not ſay the deed *of any perſon* or *of another.* That Lord Coke's definition was apparently too narrow. That the main ingredients to conſtitute the crime is the falſity of the inſtrument, and the intention to defraud; both which concurred in this caſe.

Anne Lewis's caſe, O. B. 1754, Foſt. 116. *Forging a power of attorney to receive a ſeaman's wages in the name of a ſuppoſed child, adminiſtratrix of ſuch ſeaman who died childleſs, is within the ſtatute.*

Ante, ſ. 1.

In the caſe of George Wilks, then a priſoner at Launceſton, which was ſtated to the Judges by Mr. Juſtice Gould, they were all of opinion that a bill of exchange drawn in fictitious names, when there are no ſuch perſons exiſting as the bill imports, is a forged bill within the ſtatute 2 Geo. 2.

Geo. Wilks's caſe, Bodmin, 1767, 2 MS. Sum. 346.

Mr.

Ch. XIX. §46. *In fictitious names or false characters assumed.*

Bolland's case, O.B. Feb 1772, 1 Leach, 97. *One who had put his name as indorser on a true note, finding that his name discredited the note and prevented its negotiation, struck out all but the initials and made it another name, and then procured another to discount it, describing to him the supposed indorser as a person of credit (there being in truth no such person,) and when he was afterwards called on to make good the note on the failure of the drawer and payee, he denied having discounted the note or having any knowledge of or concern in the transaction, though the discounter then insinuated his knowledge of the whole: held forgery.*

Mr. Justice Yates accordingly tried the prisoner at Bodmin, in 1767, but the jury acquitted him.

James Bolland was indicted for forging an indorsement in the name of James Banks, on the back of a promissory note for 100l., drawn by Thomas Bradshaw, and indorsed by Samuel Pritchard: which note was set forth in the indictment, and the offence laid to be done with intent to defraud F. L. Cardeneaux. There was another count for uttering the same. The drawer and payee were real persons, and Bolland into whose hands the note came indorsed it with his own name, and attempted to negotiate it in that state to one Jesson, with whom he had had money transactions. Jesson said that he knew Bradshaw, and considered him as a good man, but that he should not be able to negotiate the note with Bolland's indorsement on it; on which Bolland said he could take his name off, and immediately another person in company began erasing the name. After he had scratched off all but the initial letter B, Bolland said don't scratch it all out; it may disfigure or cancel the note; I will think of some other name that begins with a B, and immediately made the name *Banks*. Jesson then took the note, and saying that he should be asked who James Banks was, Bolland said he was a publican of Rathbone-place. Jesson soon afterwards applied to Cardeneaux to discount the note, and obtained from him some money on the credit of it; and being pressed by Bolland shortly after for the amount of the note, he took him to Cardeneaux and introduced him as the owner of the note. Cardeneaux inquired who Banks was, and Bolland informed him he was a man of property who dealt largely in wines and spirits, and lived in Rathbone-place; on which Cardeneaux gave him the value in notes and cash. Cardeneaux never desired Bolland to indorse the bill, because Jesson had before told him that it was better that his name should not appear on it, as he had been a sheriff's officer, and the note would not pass properly with his name on it. Bradshaw and Pritchard having become bankrupts before the bill was payable, Cardeneaux applied to Bolland, who denied having discounted any bill with him, and said that his name was James Bolland, that he had never seen Cardeneaux before in his life, and that he had no bill with his indorsement on it; and when Cardeneaux insinuated that

that he was acquainted with his having altered his name, he disregarded it. After the prisoner was taken up some person paid the 100l. to Cardeneaux in the name of James Banks; but no such person as James Banks of Rathbone-place appeared to exist. The jury found the prisoner guilty. After conviction and judgment of death the case was referred to the Judges: and the prisoner was afterwards ordered for execution, and suffered accordingly.

Ch. XIX. § 46. *In fictitious names or false characters assumed.*

To these may be added the cases of Lockett and Abrahams which have been before mentioned; and the cases of Taft in 1777, of Taylor in 1779, and of Shepherd in 1781, hereafter noticed.

Ante, f. 38.

Post. f. 47.

§ 47. *Immaterial whether any additional credit be gained by the forgery, or whether the false name be assumed by the party himself for the occasion.*

Further, It makes no difference whether the making of the false instrument or signature be really necessary to the advantage so fraudulently attempted to be obtained by the party, or gain him any additional credit; it is sufficient if it be made with such fraudulent intent.

Edward Taft was indicted for forging an indorsement on a bill of exchange in the name of John Williams. The bill, which was for 50l., was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was indorsed generally. It afterwards became the property of William Wheewall, out of whose pocket it was picked at Leicester races on the 16th of September 1776. The prisoner endeavoured to negotiate it the same night at Leicester, but without effect, though he offered a considerable premium. He then went to Market Harborough, where he bought a horse of the innkeeper, and offered him this bill to change, who carried it to a banker's in the town, whither the prisoner afterwards accompanied him, and the clerk offered to discount it if the prisoner would indorse it, which he was informed was the invariable rule of the house. The prisoner immediately indorsed it by the name of *John Williams*, which was not his name, and received the value of it in cash. He was found guilty; but his case was reserved for the opinion of the Judges; who on the 13th June 1777 were all of opinion that this was forgery within the statute. For though the fictitious signature was not necessary to his obtaining the money, and his intent in writing a false name was only to conceal through whose hands the bill had passed, yet it was a fraud

Taft's alias Tuft's case, Leicester Lent Ass. 1777. MS. Crown Cas. Res. 97. & Serjt. Forster's MS. (1 Leach, 206. S. C.) *Forgery, where one unknown indorsed on a bill a different name as for his own.*

Ch. XIX. §46. *In fictitious names or false characters assumed.*

Ante, 940.

a fraud both on the owner and on the perſon diſcounting it, as the one loſt the chance of tracing it, and the other the benefit of a real indorſer: and the forging a name either of a real or fictitious perſon with intent to defraud was in Lockett's caſe holden to be forgery.

John Taylor's caſe, O. B. Oct. 1779, MS. Butler J. & Serjt. Forſter's MS. (1 Leach, 255. S. C.) *Giving to the drawer of a bill of exchange a receipt in a falſe name as for the priſoner's own name, for the contents of the bill, which was indorſed in blank, is forgery; although no additional credit was thereby gained to the priſoner; being done fraudulently and to eſcape detection. Vide* S. C. poſt, ſ. 53.

Taylor was indicted for that he having in his poſſeſſion a bill of exchange, viz.

"Tamworth, 2d Aug. 1779.

"Sir,

"One month after date pleaſe to pay to my order the "ſum of £.20 val. recd &c.

"To Mr. Joſh. Cuff, "Thos. Harper."
"Whitechapel, London."

forged, &c. a receipt and acquittance for the ſaid ſum of 20l. as follows: "*Recd W. Wilſon;*" with intent to defraud the ſaid J. C. Another count was laid with intent to defraud H. Sutton. The bill was indorſed in blank, and delivered to Sutton, out of whoſe poſſeſſion the priſoner obtained it by ſome undue means, (how did not appear) and preſented it for payment. The bill then wanted two or three days of becoming due; but the priſoner ſaid he would give a trifle to adjuſt the difference, and accordingly gave Cuff 1s. for the diſcount. Cuff deſired him to write a receipt on the back of the bill, which he did by writing the receipt in queſtion in the fictitious name of Wilſon. It was contended on behalf of the priſoner that this was not a receipt for money within the meaning of the act. That the receipt here was unneceſſary, the poſſeſſion of the bill being a ſufficient diſcharge to the payer, and his diſcharge was not ſtrengthened by the words written by the priſoner; conſequently the act of the priſoner was of no effect. That he was not compellable to give any receipt. That he gained no additional credit by the name he aſſumed. That the writing on the back of the bill was in truth a mere memorandum, and did not operate as an acquittance againſt any perſon but the man himſelf who received it, who would be equally eſtopped by it as if he had written his own name. Mr. Juſtice Willes and Mr. Baron Eyre, before whom he was tried, were of opinion that the priſoner's caſe was within the letter and meaning of the ſtatute; that this was a receipt evidently falſe; and the only queſtion was, whether he intended

tended to defraud any perſon? The priſoner knew he had fraudulently acquired the poſſeſſion of the bill; that it was neceſſary to elude any inquiry after him that he ſhould conceal his name; and his intention to defraud the owner of the bill was manifeſt from his whole conduct. The priſoner was convicted: and upon reference afterwards to the Judges in Mich. term 1779, all of them (except Buller J. who doubted) were of opinion, that though the priſoner did not gain any additional credit by ſigning the name he put to the receipt, as the bill was not by the indorſement made payable to the perſon whoſe name was uſed, but indorſed in blank; yet ſtill it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent a probability of tracing the perſon by whom the money was received.

Ch. XIX. §47. *In fictitious names or falſe characters aſſumed.*

§48. *Perſonating the true man or fictitious character.*

The next conſideration, and that which ſeems to have involved in it the greateſt difficulty, is how far perſonating the true man or aſſuming a fictitious character at the time will affect the offence.

Eliz. Dunn's caſe, 1765, 2 MS. Sum. 345. & poſt. ſ. 49.

And firſt it may be proper to advert to certain principles which were laid down in the caſe of Elizabeth Dunn in 1765 after mentioned. 1ſt, That if a perſon give a note or other ſecurity as his own note or ſecurity, and the credit thereupon be perſonal to himſelf without any relation to another, his ſigning ſuch a note with a fictitious name may indeed be a cheat, but will not amount to forgery: for in that caſe it is really the inſtrument of the party whoſe act it purports to be, and the creditor had no other ſecurity in view. But 2dly, that if a note be given in the name of another perſon either really exiſting or repreſented ſo to be, and in that light it obtain a ſuperior credit, or induce a truſt which would not have been given to the party himſelf, it is then a falſe inſtrument, and puniſhable as forgery (*a*). 3dly, That the law would be the ſame, though the note or ſecurity were thus falſely ſubſcribed in the preſence of him who lent his money upon it, if the impoſtor and the party whoſe name is made uſe of were both ſtrangers to him; for then he could not

(*a*) So if one uſe another name than his own for the purpoſe of fraud, and more eaſily eluding reſponſibility, Shepherd's caſe, poſt. 967.

Ch. XIX. § 48. *In fictitious names or false characters assumed.*

know that such impostor was not really the person whose name he assumed, and therefore the other would be equally deceived.

How far the first proposition above laid down is to be taken in its utmost latitude has been the subject of much difference of opinion, which I shall now proceed to consider. It is necessary however to pursue the subject by steps.

§ 49. *Assuming to be the real person in whose name forgery is committed.*

And first I take it to be clearly settled that in the case of forgery committed in the name of a person really existing, it matters not whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such: for in truth the credit in that case is not given to the impostor personally, without any relation to another, but to that other person whom he represents himself to be.

Eliz. Dunn's case, O. B. Sept. 1765, MS. Crown Cas. Res. 16. MS. Gould J. (1 Leach, 68. S. C.) *Forgery, by giving a note in the name of another as the prisoner's own, and assuming to be such other person. The indictment setting forth the tenor of the note and including the witness's name at the end, and also the words "Mary Wallace "her mark;" held well; though the evidence proved that those additions were made after the prisoner had subscribed the note, but at the same time.*

Elizabeth Dunn was indicted for forging a promissory note for the payment of money, the tenor of which is as follows:

"London, 27th July 1765. I promise to pay to Mr. "Edwd Hooper the sum of *three* (omitting the word pounds) "13 shillings and 6d., or order, seven days after date, "value received by me

her
"Witness John Whettal." "Mary ✕ Wallace,
mark."

With intent to defraud Edward Hooper. The second count stated it to be with intent to defraud the person entitled to the wages due for the service of John Wallace deceased, a seaman on board the King's ship the Epreuve. In June 1765 the prisoner applied to Hooper at his office for receiving seamen's wages, calling herself Mary Wallace, and desired him to advance her money to pay the fees for the probate of her husband's will which was in the hands of a proctor. She returned soon after with the probate of the will of John Wallace, therein described to be a seaman on board the Epreuve; when Hooper required her to produce a certificate to prove that she was the Mary Wallace named in the will. In a few days having brought a certificate, she pressed him to lend her money on the credit of the wages

due to J. Wallace. Accordingly he let her have three guineas and a-half, and wrote the body of the promiſſory note in queſtion, to which ſhe ſubſcribed her mark; after which his clerk atteſted it. And being aſked what name he was to put to her mark, ſhe anſwered you know my name, you may write Mary Wallace; which he did. It was proved clearly that her name was Elizabeth Dunn, and that the whole account was a fabrication. The Recorder directed the jury, that if they believed that the priſoner ſubſcribed the note produced in a falſe name, either by a mark intended by her to expreſs ſuch falſe name, or by words at length, with intent to defraud Hooper; [for as to the ſecond count he thought that could not be ſupported]; they ſhould find her guilty; which they did accordingly. But judgment was reſpited on a doubt, whether as the note, though made by the priſoner in an aſſumed name and character, was her own note, made and offered as her own, and not as the note of another in contradiſtinction to herſelf, the offence amounted to forgery. In Michaelmas term 1765, preſent Lord Manſfield, Lord C. B. Parker, Clive J., Symthe B., Bathurſt J., Wilmot J., Gould J., Perrott B., Yates J., and Aſton J.; all but Aſton J. were of opinion that this was a caſe within the words and intention of the ſtat. 2 Geo. 2. c. 25., and therefore that the priſoner was properly convicted.

Ch. XIX. § 40. *In fictitious names or falſe characters aſſumed.*

Vide poſt. c. 53. for a previous objection.

(Abſent Lord Camden and Adams B.)

So in a late caſe it was laid down that if a bill of exchange payable to A. or order get into the hands of another perſon of the ſame name with the payee; and ſuch perſon, knowing that he is not the real payee in whoſe favour it was drawn, indorſe it for the purpoſe of fraudulently poſſeſſing himſelf of the money, he is guilty of forgery.

Mead v. Young, M. 31 Geo. 3. 4 Term Rep. 28. *Vide* poſt. 963.

Mathias Parkes and Thomas Brown were indicted for forging and uttering the following promiſſory note.

" No. 248. B. Ringhton, Salop, 20th April 1796.
" *I promiſe to pay to bearer on demand*, at Meſſrs. Down,
" Thornton, and Co. bankers, London, *the ſum of Five*
" *Guineas for value received.*
" *For ſelf and Co.*
" Five Guineas. Thos. Brown.
" Entered T. B."

[The words in *italics* were printed in the note.]

Parkes' and Brown's caſe, O. B. Sept. 1796, cor. Rooke J. MS. Jud. *Uttering a note in the name of another, though made in the priſoner's own name, is within the ſtatutes againſt forgery.* (2 Leach, 898. S. C.)

Ch. XIX. § 49. *In fictitious names or false characters assumed.*

With intent to defraud Wm. Hulls. Other counts were laid with intent to defraud the bankers.

The prisoner Thomas Brown uttered the note to Hulls a shoemaker in part payment for a quantity of boots and shoes which he bought, under pretence that he was a Captain Brown of the 17th regiment, and going immediately to the West Indies. The prisoner Brown when he bargained for the articles at Hulls' shop desired Hulls to send his boy with him, and he would send back the money. Hulls however chose rather to go with the prisoner; and on their way Brown stated that his brother was agent to the 17th regiment, and would buy all the shoes Hulls had. When they came to a public house Brown invited Hulls in, saying, he should see his brother presently; and after some conversation about his brother's large fortune to the amount of 15,000l. which he had lodged in the hands of Messrs. Down and Co., he appeared to be disappointed at not seeing his brother, and said, I am sorry he does not come, I must give you my brother's draft. He then gave Hulls the note in question, who asked if it was on the money lodged with Down and Co. The prisoner said yes, and added, that his brother and he always paid in that manner on demand, for they wanted no credit. He then appointed Hulls to meet him in the afternoon at another place, where he would pay him the balance. The note was soon discovered to be a forgery, and Hulls could hear nothing more of the prisoner. It appeared that Parkes and Brown were connected together; and when Parkes was taken up more than forty of these five guinea notes in blank were found upon him, dated Rinton, Salop. A few of the same sort of notes were also found concealed under a vice board in a shop where the prisoner Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the hand-writing of Parkes. The name Thomas Brown was also in the hand-writing of Parkes. In Parkes' pocket-book was found a receipt under a cover addressed to Thomas Brown at the Compter (to which prison Brown was committed) for 21l. for four five guinea bills. Down and Co. had no such customer as Thomas Brown of Rinton in Shropshire, and there was no evidence that the prisoner Thomas Brown had any residence or connexion there. The jury found

found both guilty: and on being asked, declared that they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing it was not so, with intent to defraud Hulls.

Ch. XIX. § 49. *In fictitious names or false characters assumed.*

The counsel for the prisoner made the following objections to the conviction: 1st, That the name *Thomas Brown* was the real name of one of the prisoners. 2. That it was no forgery in Parkes to sign the name of Thomas Brown with his consent. 3. That if Parkes were not guilty of forgery, Brown could not be guilty of uttering the note knowing it to be forged. 4. That the subsequent misrepresentations of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown would utter the note. That misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making. Judgment was respited to take the opinion of the Judges on these points.

The case was argued in the Exchequer-chamber in 1797 before all the Judges; and at length the conviction was holden wrong as to Parkes (on a distinct ground hereafter stated). But as to Brown, all the Judges held the conviction right; for he uttered it as the note of another person and not as his own; and it being in the same name as his own could not make any difference.

Post, f. 61.

At the December session following, Grose J., who delivered the opinion of the Judges, after stating the objections made, observed as to the 1st, that the definition of forgery was "the false making a note or other instrument with intent to defraud:" which might be done either by using the name of one who did not exist or of one who did exist, without his consent. That this was of the former description; being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist: and that the circumstance of its being made in the same name as his own could not make any difference, being uttered as the note of another and not his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, applied, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown,

Vide 2 Leach, 909.

Vide ante 963.

Ch. XIX. § 49. *I. fictitious names or false characters assumed.*

but not of *the* Thomas Brown, for whose note it purported to be given. For the person in whose name the note was made was, according to the description of him in the note, then a resident at Ringhton in Salop; and it imported that he was a correspondent of Down, Thornton, and Co. and had money in their hands; and he was also represented to be the brother of the prisoner. But no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. 3dly, That the indictment did not charge that Brown uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged:* and therefore let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it.

Hevey's case, O.B. Jan. 1782, ante, i. 5.

But where one merely assumed to be the person of a real indorser, though in concert with him, and for the purpose of fraud, it was holden to be no forgery, though a cheat; for there was no false making.

Personating others by statute.

This offence however of personating others for fraudulent purposes, which is often blended with forgery, is in many instances made a substantive offence by the statute law, and will be treated of separately in the next chapter.

§ 50. *Assuming to be a supposed character in whose name forgery is committed.*

Secondly, I take it to be equally clear that forgery may be committed in the name of a supposed character who does not exist, but is assumed by the offender for the purpose of the fraud. In Dunn's case above mentioned it was agreed to be totally immaterial whether such a person as Mary Wallace existed or not. The character which the prisoner represented herself to be was different from her own, and she obtained the credit by being supposed to be a different person from what she really was. The cases also of Taft in 1777, and Taylor in 1779, stand on this ground. In both the offenders assumed to be the identical persons whose names they subscribed, though they obtained no additional credit on that account. It is true that in Taft's case the bankers would not discount the bill without the indorsement of the prisoner, to whom in that respect it may be said that some personal credit was given, however slight; yet his person being unknown, little or no stress can be laid on that.

Ante, 962.

Ante, 959, 960.

This

Ch. XIX. § 50. *In fictiti us names or false characters assumed.*

This matter seemed once to have been put out of doubt by the case of John Shepherd, who was indicted for forging an order for the payment of money with the name of H. Turner subscribed thereto, with intent to defraud James Elliott. The order was to pay John Atkins or bearer 6 guineas, and was directed to Brown, Collinson, and Co. The prisoner came to Elliot's shop, and after selecting several articles of silver, pulled out his purse as if going to pay for them, but said he had not cash enough about him, but had a draft upon a banker, which was the same thing as money, and would be paid when presented. Elliott looked at the draft, and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner having a genteel appearance. He then desired Elliott to send him a pair of spurs, who took out his memorandum-book to take down the prisoner's direction, and supposing his name to be the same as was signed to the draft, (for he said he looked upon it as *his* draft,) he wrote down the name *H. Turner* as the prisoner's name. The prisoner looked over him as he wrote, and said he must add "jun. Noah's Row, Hampton Court." He then went away. The draft was refused payment by the bankers, no such person as H. Turner keeping cash with them. The prosecutor also inquired in Green-street from whence the draft was dated; but neither there nor at Hampton Court could he hear of any such person, nor could he hear of any such place as Noah's Row. The prisoner was found guilty; but judgment was respited upon a doubt whether as Elliott had proved that he gave credit to the prisoner, and not to the draft; having expressly said that he looked upon it to be *his* (the prisoner's) draft, though not written at the time he took it, the case amounted to forgery (*a*). In Michaelmas term 1781 all the Judges held that this was forgery and the conviction right; for it was a false instrument not drawn by any such person as it purported to be; and the using a fictitious name was only for the purpose of deceiving. And the case of Taylor in Michaelmas term 1779, that of Locket in 1771, and that of Elizabeth Dunn in Michaelmas term 1765, were relied on.

Rex v. Shepherd, O.B Sept. 1781, MS. Gould and Buller Js. MS. Crown Cas. Res. 117. (1 Leach, 265. S. C.) *Drawing a draft upon a banker in a fictitious name, assumed by the party at the time for the purpose of fraud and to avoid detection, is forgery, though the credit were given to his person.*

(*a*) Another objection was taken as to the form of the indictment. *Quod vide* ante, f. 40.

Ch. XIX. § 50. *In fictitious names or false characters assumed.*

In the abovementioned case of Shepherd the credit was indisputably given to the prisoner personally, the security tendered being considered as his alone: and it is agreed that the Judges were unanimous in adjudging the offence to amount to forgery. And yet I find it very difficult to distinguish this case upon principle from a subsequent one where the Judges were much divided in opinion: This was the case of

Aickles's case, O.B. Feb 1787, MS. Gould and Buller Js. and MS. Jud. (2 Leach, 492. S. C. reports the case materially differently.) Qu. *Where one had a month before taken the house where he lived in the name of J. M. and passed off a promissory note in that name, which he answered to be his, dated some time before, but not payable till after the time of his trial; but the jury found that he assumed the name by which he was never before known, for the purpose of the fraud; whether this be forgery?*

John Henry Aickles, who was indicted for forging a promissory note as follows:

London, Dec. 18th, 1786.

"Three months after date I promise to pay to H. Byron, "Esq. or order £.25 : 10 : 0 value received.

"£.25 : 10 : 0 John Mason,

"No. 4. Argyle-street, Oxford Road."

With intent to defraud R. H. Gedge. There was a second count for uttering it knowing it to be forged.

It appeared that the note in question was on the 9th of January 1787 tendered by Byron to Gedge's shopman in payment for some linens that were shewn by him to Byron. Upon being asked who John Mason was, Byron described him as a gentlemon of fortune with whom he was concerned in a coal-mine, living at No. 4. Argyle-street. The shopman declined leaving the goods with him, but promised to send them if upon inquiry the note were good. He immediately went to No. 4. Argyle-street, and inquired for Mr. Mason. The prisoner appeared, and said his name was John Mason, and that the note was drawn by him, and should be paid when due. It was proved that before the 9th of January the prisoner had taken the house No. 4. Argyle-street, in the name of John Mason, Esq., by which description also inquiry had been made by the person letting the house concerning his character at the British Coffee-house, which was a favourable one. It was then proved that he had always passed by the name of John Henry Aickles, and had been tried several times at the Old Bailey, and was known by that name since the year 1780 until the present time. Grose J. entertaining a doubt upon this evidence, directed the jury that the only ground on which they could convict the prisoner was, if they believed that this note was drawn by the prisoner in consequence of a concerted

certed ſcheme between him and Byron to defraud Gedge. That the priſoner had never gone by the name of John Maſon before; and had aſſumed it for the purpoſe of this fraud: in which caſe they might find theſe facts, and he would ſtate them to the Judges. Thereupon they found ſpecially, that the priſoner intended to defraud Gedge, and aſſumed the name of Maſon for the purpoſe of this fraud: that he had never gone by that name before: and that they diſbelieved a witneſs on the part of the priſoner who had depoſed that two years before he was inquired for and known by that name at the Britiſh Coffee-houſe. On this a verdict of guilty was taken by conſent, ſubject to the opinion of the Judges on the caſe.

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This caſe was adjourned from Eaſter to Trinity term, but in the mean time Mr. Juſtice Aſhhurſt had given judgment at the O. B. (*a*) that it was not forgery; conceiving that the Judges had ſo decided. Many of them indeed ſeemed to entertain ſuch an opinion, but ſeveral thought otherwiſe; and they never came to any final reſolution on the matter.

MS. Gould and Buller Js. and MS. Jud.

It appears that the priſoner at this time was under ſentence of tranſportation for a former offence, and had been tried for having been found at large without lawful cauſe before the expiration of the term. Upon ſome favourable circumſtances appearing in his caſe he was acquitted of the latter charge, and remanded upon his former ſentence.

Vide 2 Leach, 494.

Mr. Juſtice Gould (and other Judges coincided in opinion with him) thought the caſe amounted to forgery. There was an apparent deſign for fraud in general, and the jury were ſatisfied that the priſoner had aſſumed the name of Maſon, which was not his name, nor had ever been uſed by him before, but always Aickles, with intent to defraud Gedge. He therefore made the note in the name of another as if his own, and clearly with an intent to defraud. Whether there exiſted a perſon of that name or not was immaterial; the felony conſiſted in the intent to defraud under the falſity. One might aſſume a feigned name, and make a draft in it, and yet innocently; as if he concealed himſelf to avoid arreſt, and had appointed his friend on whom he drew to pay

MS. Gould J.

(*a*) This accounts for the ſtatement given in the printed report, 2 Leach, 494.

his

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his bills; or giving notes took care to pay them when due. But the prisoner having no such intention, but on the contrary to defraud the party by making the note under such disguised name, by which after he left the place of concealment he could not be traced, the case amounted to forgery. There was no ground, he thought, to distinguish this from the common case where a draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

MS. Buller J.

The Judges who inclined against the conviction went on the doubt whether to constitute forgery it was not necessary that the instrument should be made as the act of another, according to the definition of Lord Coke, whether that other existed or not. Whereas here the note was made as the prisoner's own, and avowed by him to be so: the credit was given to the person and not to the name; and the person and not the name was the material thing to be considered.

I cannot help suspecting that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together. It seems very difficult to distinguish the last case from Shepherd's before mentioned. It may be said that in Shepherd's case the prisoner had not been known by the name of H. Turner previous to the transaction; but merely assumed to be such a person at the instant for the purpose of the fraud; and that in truth no person was found to answer the description of the man he pretended to be. But if this matter be accurately considered, it must appear that the length of time during which the fictitious name has been adopted previous to the fact is only evidence of the intent, any more than the true description of the party's place of abode. If the party for other purposes have adopted another name by which he is known, and issue his signature accordingly, it may be a good reason with the jury for finding that he really intended at the time to issue it as his own instrument, and did not adopt the name then with a view to shift the future responsibility of it from himself under the colour of its being the act of another. But the finding of the jury in Aickles's case seems to have

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have concluded that queſtion; for they found that the priſoner aſſumed the name by which he had never been known before for the purpoſe of defrauding Gedge; unleſs indeed it may be ſaid that ſuch a finding does not neceſſarily include that the fraud was intended to be effected at the time by diſowning the note afterwards as the act of another and not of himſelf. I do not ſtop to inquire whether this were a proper finding under all the circumſtances, becauſe it is not my intention to diſcuſs a mere matter of evidence, or a deduction of fact. But aſſuming the concluſion of the jury to be right, the doubt is as applicable to the former caſe of Shepherd as to this of Aickles. Shepherd did no more than aſſume the name of H. Turner, by which he had never been known before, for the purpoſe of defrauding Elliott: Aickles did the like under the aſſumed name of Maſon. It is poſſible therefore that the Judges who doubted in the latter caſe went upon the ground, that it did not appear from the evidence that Aickles made uſe of the name of Maſon with a deceitful intention at the time of afterwards diſowning the act in order to avoid the reſponſibility and eſcaping detection; but intended at the time to abide by the act as his own, and meet the conſequences as well as he could. Where an impoſtor aſſumes the name and character of an exiſting perſon for ſuch a purpoſe, the very act is deciſive of ſuch an intent. Where a particular character is aſſumed, though not exiſting in reality, as the executor of another who is in truth alive, the intent appears equally plain. But in the bare aſſumption of a fictitious name without any particular deſignation of character annexed to it, it may be more difficult upon occaſion to fix this intention upon the party; becauſe the act itſelf is of a more equivocal nature. Yet it cannot be conceived but that if a rogue knowing that he cannot obtain credit under his real name, aſſume another for the purpoſe of practiſing his impoſition more eaſily, and under ſuch aſſumed name negotiate a note, intending at the time to ſkulk from his reſponſibility under pretence that it was not his proper act; ſuch a caſe would fall ſtrictly under the definition of forgery; although he may, the better to colour his purpoſe, have aſſumed ſuch fictitious name ſome little time previous.

I obſerve that in Aickles' caſe the note was dated the 18th of December 1786, and made payable three months after date.

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date. He was tried in February 1787, which was before the note became due. It does not appear but that he continued to pass by the same name of Mason to the time of his apprehension, as he had certainly done for some time (how long does not appear) before the 9th of January when the note was negotiated, and probably at the time it bore date: there was no opportunity of knowing whether he meant to disavow his act at the time of payment, which might have been evidence of his original intent; though such intent might certainly be collected from preceding and intermediate acts. The Judges who were disposed to acquit the prisoner of forgery probably thought that there was no evidence of any such intent. The intent however is strictly a matter of fact for the jury to pronounce upon under all the circumstances; and if properly left to them must conclude the question.

But to consider the matter truly, does not the very act of changing his name for such a fraudulent purpose carry in itself intrinsic evidence, that the party wishes to be thought a different person from what he really is, and consequently to pass off his act as the act of another. The instrument is false; and if the intention be to deceive and defraud, it falls expressly within the definition of forgery. And if it be part of that definition that the act should be done in the name of another, such a change of name may under circumstances furnish evidence of its having been so done. Though it may be doubted how such an amended definition will square with the case of a party antedating a deed of conveyance in his own name in order to give it a fraudulent priority over another, or with any cases of fraudulent alterations of instruments by the parties themselves who made them, in prejudice of the rights of other persons; which are all admitted to be forgeries.

Ante, f. 1.

§ 51.

VI. *What is a publishing or uttering.*

3 Inst. 171.

To pronounce or publish, says Lord Coke, is when one by words or writing pronounceth or publisheth the instrument to any other as true. It extends no doubt to every other manner of exhibiting it as a true instrument. But in order to constitute such an offence, it must be done with knowledge of the forgery; which knowledge may come by the relation of another

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another as well as by the party's own observation. If, says Lord Coke, A. inform B. that such a deed is forged, and yet B. will publish it; if the deed be false, this is within the words (i. e. of stat. 5 Eliz.) "knowing the same to be forged." But such relation is not conclusive evidence of the fact of knowledge; it must be left to the jury upon the whole matter; for possibly there might be circumstances which might invalidate or weaken the credit of the person relating it, or of his relation itself, though it afterwards appear to be true. This is an offence distinct from, though connected with, the act of false making or forgery, as was before shewn; and therefore it is the common practice to indict persons who knowingly utter forged instruments as principals; and there may be accessaries before to such offence, as in the case of Soares and others stated in the ensuing section.

1 Hawk, ch. 70. s. 3.
1 Hale, 685.

Ante, s. 4. *Vide* the case of Parkes and Brown, ante, 963. and Reeves' case, 2 Leach, 492. 3 Inst. 171. and O'Brian's case, 2 Sess. Cas. 369.

VII. *What shall make a Person assisting or Accessary.*

§ 52. *Aiders and accessaries.*

Lord Coke, speaking with great critical nicety, says, that *to cause* is to procure or counsel one to forge; *to consent* is to agree at the time of the procurement or counsel; and he in law is a procurer; *to assent* is to give his assent or agreement afterwards to the procurement or counsel of another. But this must be understood of an assent to the design of forging before the fact of the forgery committed; for according to Lord Hale, an assent afterwards makes not the party guilty or principal in the forgery; but it must be a precedent or concomitant assent. And in forgery it is laid down generally in the books that all are principals; and that whatever would make a man accessary before in felony, will make him a principal in forgery. But this must I think be understood of forgery at common law, and where it is considered only as a misdemeanor. For though Bothe's case where it was so resolved was an indictment for felony for the second offence upon the stat. 5 Eliz., yet that was not the principal point in judgment. Nor indeed does it appear how the question arose there, as none other than the prisoner appears to have been indicted. Therefore there seems no reason for taking this case out of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all

3 Inst. 169.

1 Hale, 684.

Bothe's case, Moor, 666. Ms. Tracy, 145. 2 Hawk. ch. 29. s. 2. 1 Sid. 312. R. v. W. Hales and Kinnersley, O. B. Jan. 1729, cor. Ld. C. B. Pengelly, Reynolds J. and others, 9 St. Tr. 77. 92. and R. v. Robt. Hales, Hil. 2 Geo. 2. B. R. on a trial at bar, Masterman's Notes.

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all the concomitants of felony, namely, acceſſaries before and after. This reaſon ſeems to be confirmed by the following caſe, which has lately occurred:

Soares, Atkinſon, and Brighton's caſe, Winchester Spring Aſſizes 1802. cor. Le Blanc J. MS. Jud. *Thoſe who were privy to the uttering of a forged note, by previous concert with the utterer, but were not preſent at the fact of uttering, cannot be indicted as* Principals, *but only as* Acceſſaries before.

Samuel Soares, William Atkinſon, and John Brighton were tried at Wincheſter on an indictment charging them with feloniouſly uttering and publiſhing as true a certain falſe, forged, and counterfeit bank note for 5l., knowing it to be forged, &c. with intent to defraud the governor and company of the Bank of England. There were the other uſual counts for forging and for diſpoſing of and putting away the note, with the like intent; and ſimilar counts ſtating the intent to be to defraud the perſon to whom it was offered in payment. It was proved that Brighton offered the note in queſtion in payment for a pair of gaiters at the ſhop of one Newland at Goſport, on Saturday the 1ſt of Auguſt 1801, about 5 o'clock in the afternoon. The other two priſoners *Soares and Atkinſon were not with Brighton at the time he ſo offered the note in payment*, nor were they at the time *in Goſport*, but both of them were waiting *at Portſmouth* till Brighton ſhould return to them, it having been *previouſly concerted between the three priſoners* that Brighton ſhould go over the water from Portſmouth to Goſport for the purpoſe of paſſing the note, and when he had paſſed it, ſhould return to join the other two priſoners at Portſmouth; they all three *knowing* that it was a forged note, and having been concerned together in putting off another note of the ſame ſort, and in ſharing among them the produce.

The counſel for the priſoners Soares and Atkinſon objected on their behalf, that on the above evidence they were not guilty as charged by this indictment, not being preſent at the time the other priſoner uttered the note, nor ſo near as to be able to aid and aſſiſt him: that they could be charged only as *acceſſaries before* the fact. The jury found that the forged note was uttered by the priſoner Brighton by concert with the other two priſoners, and found them all three guilty. The priſoner Brighton was left for execution: but judgment was reſpited as to the other two; the counſel for the Bank deſiring to have an opportunity of arguing it, if on conſideration they ſhould think the indictment maintainable againſt the two who were not preſent. On the report of this caſe to all the Judges in Eaſter term following, they had no doubt but that the two priſoners Soares and Atkinſon were entitled

to

to an acquittal on this indictment charging them as principals, they not being present at the time of the uttering; and therefore required the prosecutor to state on what grounds the contrary was meant to be argued: and no suggestion of the kind being made, the two prisoners were recommended to a pardon.

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The words of the stat. 5 Eliz. are *cause or assent to*: those of most of the subsequent statutes are *cause or procure*, or *act or assist in*, or *aid or assist in*: the Legislature seem to have varied the expression, in describing accessaries before, and aiders and abettors at the fact.

Vide Post. 130.

VIII. *Some general Rules touching the Manner in which the Offence is to be laid in the Indictment, and proved in Evidence.*

§ 53. *Indictment and evidence.* For other general matters vide the head of Indictments.

It is essentially necessary to an indictment for forgery that the instrument alleged to be forged should be set forth in words and figures; though there be no technical form of words for expressing that it is so set forth.

Mason's case, Northumberland Sum. Ass. 1792, MS Buller J. and MS. Jud. *Indictment for publishing a forged instrument must set it forth in words and figures.* (*Vide* Lyon's case, 2 Leach, 696. S. P.)

Mr. Baron Thomson reported to the Judges that James Mason was tried and convicted before him, upon an indictment, which set forth that he, having in his custody and possession a certain inland bill of exchange, purporting to have been signed and subscribed with the name of one Robert Brown, and to bear date at, &c. and to be directed to certain persons by the name and description of E. H. W. and Co., thereby requiring them to pay to J. A. or order 91 l. 19s. 6d. two months after date, value received, and to place it to the account of certain persons by the name and description of Messrs. J. T. A. and Co., as advertised by the said R. B., and purporting to have been indorsed by J. A., together with a false, forged and counterfeited acceptance of the same bill of exchange, written upon the same bill, and purporting to have been written by the said E. H. for and on behalf of himself and his said company, did feloniously utter and publish as true the said false, forged, and counterfeited acceptance, with intent to defraud one J. W.; he the said defendant well knowing the said acceptance to be false, forged, and counterfeited. Judgment was respited on a doubt whether the indictment were sufficient, as it did not set forth the bill of exchange and the acceptance in their words and figures. The case was adjourned from Michaelmas term 1792 to Easter term 1793, and again to Trinity

term

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term following, when all the Judges agreed that the indictment was bad.

A similar determination was made in Lloyd's case (*a*) by all the Judges, upon an indictment for sending a threatening letter, which omitted to set out the letter itself.

Eliz. Dunn's case, ante, f. 49. M. Crown Cas. Res. 16. *Indictment stating* tenor *of a note sustained by proof that the attestation of the witness and the words* M. W. her mark *were added after the prisoner's signature, though on the same occasion.*

In Elizabeth Dunn's case some doubt was at first entertained by the Recorder whether the indictment were proved; because it included the *attestation* of the witness, and the words "Mary Wallace her mark," in the tenor of the note charged to have been forged by the prisoner; the fact being that when the prisoner subscribed the note, those parts of it were not then written, and therefore she had forged a note differing in the tenor of it from that charged in the indictment. But Mr. Baron Perrott and Mr. Justice Aston, whom the Recorder consulted, being of opinion that in this respect the indictment was well proved, the Recorder directed the jury upon the principal charge.

Rex v. Powell, O. B. May 1771, 2 MS. Sum. 346 (2 Blac. Rep. 787. & 1 Leach, 90. S. C.) *Setting out the instrument* as follows, *sufficient, without naming the word* tenor. *It must be set out in* figures *as well as words.*

Robert Powell was indicted on the stat. 2 Geo. 2. for forging a certain receipt for money *as follows*; [setting forth the receipt in the words and figures] with intent to defraud Jos. Sykes. Other counts laid the intent to defraud Taylor Barrow. The fact was, that Powell had personated Barrow in the sale of 400l. East-India stock to Sykes, and had signed in his name the usual receipt upon the transfer. Several objections were made in arrest of judgment, which were argued before all the Judges at Serjeants' Inn on 30th of Nov. 1771. 1st, That the indictment should have set forth the receipt according to "the tenor following," which the words "as follows" do not import. But resolved by all the Judges that the words were to be taken the same as "according to the tenor following," or "in the words and "figures following;" and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance. 2dly, It was objected that in the receipt some of the sums are in *figures*, which must not be in an indictment. But held that the receipt must be pursued exactly as it is, or it would be a variance. The prisoner was executed. It was laid similarly in Hart's case.

Vide S. C. post, f. 59. for another point. Smith's case, Salk. 342.

After these authorities I cannot but question Smith's case, E. 2 Ann., where it is said in the report, that where a deed with the mark of J. S. was forged, the indictment need not set out the mark.

(*a*) Lloyd's case, Trin. term 1767, 2 MS. Sum. 329.

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Yet even the ſetting out the very ſubject matter which has been forged will not in all caſes be ſufficient, if it do not purport on the face of it and without reference to ſome other ſubject matter to be the thing prohibited to be forged: but the purport and meaning of the forgery with relation to ſuch other ſubject matter ſhould be expreſsly averred to be the thing ſo prohibited. Thus in Hunter's caſe before mentioned, who was indicted for forging a receipt to an aſſignment of a certain ſum in a navy bill, the tenor of which receipt ſet forth in the indictment merely conſiſted of the ſignature of the party; it was holden inſufficient, becauſe the mere ſigning of ſuch name unleſs connected with the previous matter did not purport on the face of it to be *a receipt:* but it ought to have been averred that ſuch navy bill, &c. together with ſuch ſignature did purport to be and was a receipt, &c. and that the priſoner did feloniouſly forge the ſame. And yet in Teſtick's caſe, where the tenor of the receipt ſet forth in the indictment was in theſe words, "Received the contents above by me," &c. it was holden ſufficient without ſetting forth the bill to which it referred, or connecting the receipt by averment with ſuch bill, but only averring it to be a receipt for money. But there by the very terms of the writing itſelf it purported to be a receipt for ſomething, though not ſpecifically for *money*, as it was averred to be, in order to bring it within the ſtatute 2 Geo. 2. c. 25. Again, in Taylor's caſe, which was for forging a receipt for 20l. due upon a bill of exchange in theſe words, "Received, W. Wilſon," the indictment ſet forth the bill for 20l., and then averred the forging of a receipt for the *ſaid* ſum of 20l.; but there was no averment that the writing forged together with the bill purported to be or was a receipt. But there alſo the forged writing in itſelf purported to be a receipt for ſomething.

Hunter's caſe, ante, f. 36.

Teſtick's caſe, ante, f. 36.

Taylor's caſe, ante, f. 47.

§ 54. *Literal variance.*

In ſetting forth however the tenor of an inſtrument a mere literal variance will not vitiate the indictment; as in the following caſe.

Hart's caſe, Worceſter Lent Aſſ. 1776, MS. Gould J. and MS. Crown Caſ. Reſ. 57. (1 Leach, 172. S. C.)

Thomas Hart was indicted for forging a bill of exchange, which the indictment ſet forth as follows, (that is to ſay,)

"No. 215. £.42:0. Hull, April 24th, 1775.
"Two months after date pleaſe to pay Mr. Thos.

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" Jones or order the sum of forty-two pounds value " *received*, and place the same to account, &c.

" George Prince.

" Messrs. Halliday and Co. Bankers, London."

Received *for* reicevd *held not a material variance, being still the same word. Vide* 2 Stra. 889.

The bill produced in evidence corresponded with that set forth in the indictment, except that it was written " value " reicevd." The prisoner was convicted; but judgment was respited upon the question whether this literal variance were material, the words sounding the same. And on the 7th of June 1776 all the Judges [De Grey C. J. and Willes J. absent] were of opinion that the variance was not material, as it did not change the word. And by Gould J., if the word had been written *receiv'd* or *recev'd*, the *e* in the one instance and the *i* in the other must have been necessarily understood. In Rex v. Bear, Carth. 408. the Court agreed that where an instrument is laid in the indictment according to the tenor, &c. the very *words* laid, and not the substance and effect of them, must be proved. The question then is as to the *word* and not the *letter*, unless by *addition*, *omission*, or *alteration* it becomes another word; as in the Queen v. Drake, which proceeded upon its being a different word, *nor*, for *not*. And Powys J. says, in the report of the same case in Holt Rep. 350. that he did not mark this to be so small a variance of a letter as if it happened *in false spelling* or *abbreviations*, which possibly might not hurt.

(R. v. Bear (*a*).)

(Reg. v. Drake,) Salk. 661.

§ 55. *Where true instrument in part altered.*

If any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument.

Dawson's case, Mich. 3 Geo. 1. Ld. King's MS. cited from Serjt. Forster's MS. (1 Stra. 19. S C.)

The prisoner altered the figure of 2 in a bank note to 5 (220l. to 520l.); and ten Judges agreed that this was forging and counterfeiting a bank note; forgery being the alteration of a deed or writing in a material part to the prejudice of another, as well as when the whole deed or writing is forged; and that 3 Inst. 171, 172. was not law in this respect; for non assumpsit might be pleaded to such a note.

(*a*) In Lord Holt's MS. note of this case, which is very fully reported, it is stated generally, that laying an indictment for a libel juxta *tenorem* sequentem imports that the indictment sets forth the *words* of the libel, and not merely the *effect* of it. The indictment there set forth the libel *juxta tenorem et ad effectum sequentem.*

John

Ch. XIX. §55. *Indictment and evidence.--Alteration of true bill.*

John Teague was tried on an indictment charging him with feloniously, &c. *making, forging, and counterfeiting* a certain bill of exchange as follows, viz. "No. 2-621. £.50. "Brecon, 24th June 1799. On demand pay to the bearer "£.50. value received. For Wilkins, Jeffreys, Wilkins, "and Williams. (Signed) Walter Jefferies," (and addreſſed to) "Meſſrs. Miles, Vaughan, and Co., Bankers, "Briſtol;" with intent to defraud W. W. &c. againſt the ſtatute. There was a ſecond count for uttering the ſame knowing it to be forged. Two other ſimilar counts ſtated the intent to be to defraud T. Powell. It appeared that the bill was drawn and iſſued by Walter Jeffreys, one of the partners of the houſe, for 10*l. only*, on a *ſixteen-penny* ſtamp, which is the proper ſtamp for *promiſſory notes* of 10l. which are to be re-iſſued after they ſhall have been paid. That this bill of exchange had been re-iſſued three times as a 10l. bill. That it had been altered by changing the 10l. into 50l. in the part of the bill where the ſum is expreſſed in figures, as alſo in the part where it is expreſſed in letters; and ſo altered had been paſſed by the priſoner to Thomas Powell. The jury found the priſoner guilty of uttering it, knowing it to be forged: but judgment was reſpited on two objections made by the priſoner's counſel; firſt, that this being a forgery by *altering* the ſum in a *genuine* bill, it ſhould have been ſo ſtated in the indictment; the ſtat. 7 Geo. 2. c. 22. making it a diſtinct offence *to alter*, viz. "If any perſon "ſhall falſely make, *alter*, forge or counterfeit, or utter or "publiſh as true any *falſe, altered*, forged or counterfeited "acceptance of any bill of exchange," &c. Secondly, that the act permitting the re-iſſuing of *notes* after the ſame ſhall have been paid relates only to *promiſſory notes*, but this is *a bill of exchange*, and could not be legally re-iſſued without a freſh ſtamp; and having been re-iſſued three times before it was altered, it was not a valid bill for 10l. at the time it was altered to 50l., and therefore it was not that ſpecies of forgery which conſiſts in altering a true and valid bill.

At a conference of the Judges in Michaelmas term following, they all held the conviction right. For that the queſtion as to the *alteration* of the bill was governed by the caſe of the King v. Dawſon abovementioned: and every alteration of a true inſtrument for ſuch a purpoſe made it when altered a

Teague's caſe, Hereford Sum. Aſſ. 1802, cor. Le Blanc J. MS. Jud.

One who alters a true inſtrument may be indicted capitally on the ſtat. 7 Geo. 2. c. 22. *for forging the inſtrument (viz. a bill of exchange); though the ſtatute has the word alter as well as forge; for every alteration of a true inſtrument makes it a forgery of the whole: and it is no leſs a forgery though the inſtrument altered (a* 10*l. bill of exchange) had been re-iſſued before three times, without being re-ſtamped; and was therefore not available in a civil action at the time of ſuch alteration.*

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forgery of the whole inſtrument. That as to the objection on the ſtamp, it had been decided that the ſtamp acts had no relation to the queſtion of forgery: but that ſuppoſing the inſtrument forged to be ſuch on the face of it as would be valid provided it had a proper ſtamp, the offence was complete.

Vide the caſes before cited, P. 955, &c.

It has been more uſual however hitherto to lay forgeries of this ſort, as was done in Harriſon's caſe before, and in Elſeworth's caſe after mentioned, by ſtating the particular alteration, at leaſt in one count.

Ante, f. 36.

Poſt. p. 986.

§ 56. *Purport.*

Though it be doubtleſs ſufficient to charge that the defendant forged ſuch an inſtrument, naming it, and ſetting forth the tenor; yet certainly the laying it to be *a paper writing*, &c. *purporting* to be ſuch an inſtrument (as the ſtatute on which the indictment is framed deſcribes) is good; and indeed in ſtrictneſs of language there may be more propriety in ſo laying it, conſidering that the purpoſe of the indictment is to diſaffirm the reality of the inſtrument.

Birch and Martin's caſe, O. B. Sept. 1771, 2 Blac Rep. 790. 2 MS. Sum 347. *Indictment for forging* a paper writing, purporting to be the will *of another, is good.*

Birch and Martin were indicted and convicted of publiſhing, "as a true will, a certain falſe, forged and counterfeited "*paper writing, purporting to be the laſt will* of Sir Andrew "Chadwick," &c.; the tenor of which was ſet out. The matter was debated before all the Judges at Serjeants' Inn on the 30th of November 1771, when it was objected, 1ſt, that it ſhould have been laid that they forged a certain *will*, and not *a paper writing purporting*, &c.; for the ſtatute ſays, "ſhall forge *a will*." But a variety of precedents being produced in which it was laid in that manner, the Judges held it to be good either way. 2dly, It was objected that it was not ſtated that it purported to be atteſted by three witneſſes: but to this it was anſwered and holden, that as the will was ſet forth *in hæc verba*, and the three names appeared as witneſſes, that was ſufficient. 3dly, That it was only laid, "they knowing it to be forged," &c.; whereas it ſhould have been that "they and each of them knowing," &c. ſed non allocatur. And the priſoners were executed.

Poſt, 983.

But in all caſes the word *purport* imports what appears *on the face of the inſtrument;* for want of attending to which many indictments have been ſet aſide.

In

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In Jones's case in 1779, the instrument was laid in some counts to be *a paper writing purporting to be a bank note:* but the Court were of opinion, that as it did not purport on the face of it to be a bank note, the counts could not be supported; and that the representation of the prisoner at the time, who passed it off as such, could not vary the purport of the instrument itself.

Jones's case, ante, p. 883.

Jeremiah Reading was indicted, for that he having in his custody and possession a certain bill of exchange with the name John White thereunto subscribed, *purporting* to be signed by one John White, and *to be directed to one John King, by the name and description of one John Ring Esq.*, Berkley-street, Portman-square, London, for the payment of the sum of 80l. to him the said defendant, or order, forty days after date, &c., which said bill of exchange is to the tenor and effect following:

Reading's case, O. B. Sept. 1793, MS. Buller J. and MS. Jud. Ante, 1752. (2 Leach, 672. S. C.)

Indictment charging that defendant being possessed of a bill of exchange, purporting to be directed to J. King by the name, &c. of J. Ring, forged the acceptance of the said J. King, is bad; for Ring does not purport to be King.

" Bristol, Feb. 21st, 1792.

" Forty days after date pay to Mr. Jeremiah Reading, or " order, the sum of £.80. for value received, and place it " to the account of " John White.

" To John Ring Esq. Berkley-st., Portman-square, Lond."

he the said defendant on, &c. did falsely make, forge and counterfeit, &c. upon the back of the said bill of exchange an acceptance in writing, *purporting to be the acceptance of the said John King*, of the said bill of exchange, which said false, forged and counterfeited acceptance is to the tenor and effect following, viz. " John King, A." with intent to defraud W. D. &c. There was a second count for uttering the same.

It was proved that the prisoner negotiated the bill, which was directed to John *Ring*, and accepted on the back of it by John *King;* and that he told Mr. Dalby the prosecutor who advanced money upon it, that Mr. King was a gentleman living in Berkley-street, Portman square, and a man of opulence. It appeared in evidence that there was no person of that name living there. The prisoner was found guilty; but Mr. Justice Grose reserved the case for the opinion of the Judges, whether the bill of exchange were properly described in the indictment, and whether the offence laid in it were proved. In Hilary term 1794 judgment was arrested,

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O B. Feb. 1794, *vide* 2 Leach, 674.

because the bill did not in fact *purport* to be drawn on J. *King*, as laid in the indictment.

Buller J. in delivering the opinion of the Judges afterwards at the O. B. observed, that the indictment as drawn was absurd and repugnant in itself; for the name and description of one person or thing could not purport to be another. That the drawer of the indictment was led into the blunder by not recollecting that the bill, though drawn on John Ring, might have been accepted by John King; as if he had accepted it for the honour of the drawer, &c. But he observed, that the judgment being arrested for the informality of the record, the prisoner might be again indicted for the offence he had been guilty of.

Gillchrist's case, O. B. 1795, MS. Buller J. and MS. Jud. (2 Leach. 753. S. C.) *The word* purport *imports what appears on the face of the instrument. Therefore indictment for forging an order for payment of money, stating that it* purported *to be directed to* A. B. C. *by the names of* A. C. D. *and setting forth the tenor as directed to* A. C. D., *held bad.*

And lastly, in the case of one Anselmo Robinson Gillchrist, who was indicted for forging "*a paper writing, purporting to be an order for payment of money, dated 11th September* 1794, with the name Thos. Exon thereunto subscribed, *purporting* to have been signed by Thos. Exon, clerk, and *to be directed to George Lord Kinnard*, Wm. Moreland, and Thos. Hammersley of, &c. bankers and partners, *by the name and description of Messrs. Ranson, Moreland, and Hammersley*, for the payment of the sum of 10l. &c.;" the tenor of which said false writing, &c. is as follows, viz.

"Messrs. Ranson, Moreland, and Hammersley, please
"to pay to Mr. Brooks, or bearer, the sum of Ten
"Pounds, for
"Sept. 11th, 1794. Thos. Exon."

with intent to defraud the said Geo. Ld. K. &c. There was a second count for uttering it; and other counts charging an intent to defraud other persons.

An objection was made in arrest of judgment, that the direction of the bill was improperly described in the indictment; and the above case of Reading was relied on. And upon a conference of the Judges in Easter term 1795, it was resolved by ten Judges present, that the judgment should be arrested accordingly, because the word *purport* imports what appears on the face of the instrument. It means the *apparent* and not the *legal* import. And that this could not purport to be directed to Lord Kinnard, because his name did not appear on the face of the bill. And Jones's case and Reading's case were referred to.

Buller

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Buller J., who delivered their opinion at the O. B. in July following, obſerved, that old caſes had given riſe to much learning and argument on the words *purport* and *tenor*, and on the neceſſity of uſing one or other of thoſe terms; but that no judicial determination that he was aware of had ever required that the *purport* and *tenor* ſhould both be ſtated in any caſe whatever. That the purport of an inſtrument meant the ſubſtance of it, as it appeared on the face of the inſtrument to every eye which read it. The tenor of an inſtrument meant the exact copy of it; and where that was ſtated the purport of it muſt neceſſarily appear. That the forms of indictments for forgery had differed in different inſtances, and of late years had become more complicated than they uſed to be, and in his opinion very improperly ſo. In one, which he had ſeen, it was ſtated that the priſoner forged a falſe writing in the names of J. S. &c. *bearing the form of a warrant of attorney, which ſaid writing follows in theſe words, &c.* If an indictment ſtated merely that the priſoner forged a paper writing to the tenor and effect following, and ſet out the inſtrument verbatim, which on the face of it appeared to be a bill of exchange or other inſtrument within the ſtatute; as then adviſed, he ſaw no objection to it: and at all events if it ſtated that he forged a paper writing in the name of T. E., purporting to be a bill of exchange, to the tenor and effect following, and then ſet out the bill; he thought it would be good and unexceptionable: for the words "purporting to be a bill of exchange," could only be neceſſary for the purpoſe of ſhewing which of the inſtruments mentioned in the ſtatute the priſoner had forged: and in order to do that it could not be neceſſary under the word *purport* to ſtate all the contents of the bill. The bill itſelf ſhewed all thoſe things, and the law had required that an exact copy of the bill ſhould be ſtated upon the indictment, in order that the Court might ſee upon the record that it was in form ſuch an inſtrument as fell within the words and meaning of the ſtatute. That the blunder in this caſe had ariſen from the circumſtance that Lord Kinnard and Meſſrs. Moreland and Hammerſley had carried on the buſineſs of bankers under the firm of Meſſrs. Ranſon, Moreland, and Hammerſley: and the perſon who drew this indictment, forgetting that it was wholly immaterial whe-

MS. Buller J.

Ante, 980.

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ther such a firm as Ranson, Moreland, and Hammersley ever existed, or who were the persons who constituted that firm, had taken great pains to shew that the bill drawn on Ranson, Moreland, and Hammersley, was drawn on Lord Kinnaird, Moreland, and Hammersley: and in order to do that, he had averred that the bill *purported* to be drawn on Lord Kinnaird, Moreland, and Hammersley. But it purported that alone which appeared on the face of the bill: and upon the face of the bill Lord Kinnaird's name was not mentioned; and therefore it did not purport to be drawn on him. The consequence was, that the indictment was repugnant and defective, and the prisoner was discharged from it. But as the objection went only to the form of the indictment and not to the merits of the case, he was remanded to prison till the end of the sessions, that the prosecutor might be at liberty to prefer another and a better indictment against him if he thought fit.

Edfall's case, Southampton Sp. Ass. 1798, cor. Thomson B. MS. Jud. *ad idem.*

Again, in Edfall's case, who was convicted on an indictment which charged him with forging a certain paper writing, *purporting* to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, Winchester, 14th Nov. 1796, and to be *directed* to *Richard Down, Henry Thornton, John Freer, and John Cornwall the younger*, bankers, London, by the name and description of Messrs. Down, Thornton, and Co. bankers, London, requiring them ten days after date to pay to Mr. Wm. Simmons or order 81. 10s. &c. and then setting out the tenor by which the bill appeared, as the fact really was, to be directed "to *Messrs. Down*, "*Thornton, and Co.*, bankers, London." The Judges, upon reference to them, held the indictment bad, upon the authority of Gilchrist's case; though Buller J. disapproved much of that determination; which however he admitted could not be distinguished from the present case (*a*).

Trin. Term, 1798.

Isaac

(*a*) *Vide* Reeve's case, O. B. Jan. 1798, 2 Leach, 933. the consideration of which was pending before the Judges when the last mentioned case was reserved for their opinion. One of the objections there was that the indictment charged that the prisoner forged a certain seaman's receipt, "with the name C. Olier thereunto "subscribed, *purporting* to have been signed by one *Christopher* Olier," &c. whereas C. Olier did not necessarily purport to be *Christopher* Olier, but might be Charles, &c. The objection was for the present over-ruled by the Court, (consisting of Heath and Lawrence Js. and Thomson B.) thinking there was a shade of distinction between this and Gilchrist's case; there being no such absolute repugnance here

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But where Isaac Carter was indicted for forging and knowingly uttering a bill of exchange, described in the indictment to be "a certain bill of exchange requiring certain persons by "the name and description of Messrs. Down, &c. 20 days after "date to pay to the order of R. Thomson the sum of 315*l.* "value received, *and signed by Henry Hutchinson* for T., G., "T., and H. Hutchinson, which bill of exchange so falsely "made and counterfeited is as follows, (setting out the bill) "&c. with intent to defraud G. Hutchinson," &c. On proof that the signature to the bill "*Henry Hutchinson*" was a forgery, it was objected that the indictment averring it to have been *signed by him*, (and not merely that it *purported* to have been signed by him), which was a substantial allegation, was disproved: and so the Judges held on reference to them, after conviction.

Carter's case, York Sum. Ass. 1800, cor. Graham B. MS. Jud. *An indictment for forging a bill of exchange, stating it to be signed by* H. H., *instead of* purporting *only to be so signed, the signature itself being a forgery, is bad.*

§ 57. *What technical words at common law.*

It is usual to charge that the party *falsely* forged and counterfeited, &c.; but it is said to be enough to allege only that he *forged* or *counterfeited* (*a*), without adding *falsely*, which is sufficiently implied in either of those terms; particularly in the verb to *forge*, which as was first mentioned is always taken in an evil sense in our law. In like manner as it was adjudged in Warbell's case, 2 Rol. Abr. 82. that where a fact laid in the indictment appears plainly to be unlawful, there is no need to say *illicitè*.

Savage's case, Sty. 12. Ante, s. 1.

§ 58. *Indictment should bring the offence within the words of a statute.*

It is a general rule applicable to this as to other offences, that an indictment on a statute must in general set forth the charge in the very words of the statute describing the offence; for equivalent words are not sufficient. Besides which, as was before shewn, the instrument itself must be set forth, that it may appear to the Court to be what it is alleged to be.

2 Hawk. ch. 25. s. 110. 1 Hawk. ch. 70. s. 26. 3 Inst. 13.

But a superfluous description does not appear to be objectionable; as in John Dunnett's case, who was charged

Dunnett's case, O.B. Dec. 1792, MS. Buller J. and MS. Jud.

here upon the face of the indictment as in that case; but they reserved the point for the opinion of the Judges. But it does not appear what that opinion was; for there were other objections taken to the conviction; and finally the prisoner was capitally convicted on another indictment pending for a similar offence.

(*a*) The Latin words formerly in use were *fabricavit* et *contrafecit*. *Vide* Mafiot's case, 2 Lev. 221. and Dawson's case, 1 Stra. 19.

with

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with uttering and publishing as true "a certain false, "forged and counterfeited *bond and writing obligatory*," purporting to have been signed by P. R. &c. as follows: "Know all men, that we P. R., W. G., and W. L., of L., "are held and firmly bound to J. Dunnett of, &c. in 2510l. "to be paid to the said J. D., &c. by us, &c.; therefore we "are firmly bounden to the said J. D. in the said sum, &c." dated 20th November 1790, &c., signed P. R., &c., and sealed and delivered, &c. knowing it to be forged, &c. The indictment was founded on the stat. 2 Geo. 2. c. 25. s. 1. which has both descriptions, *bond*, and *writing obligatory*: and the objection taken was, that as the act of parliament in enumerating the several instruments, the forgery of which it prohibits, mentions both; the indictment ought to have described the offence more particularly either as a forgery of the one or the other, and should not have called it *a bond and writing obligatory;* but in the present case should have described the instrument as a *writing obligatory*, and not as a *bond;* having neither a defeasance nor penalty annexed to it: and that although a bond were a writing obligatory, yet that the converse did not hold; therefore they were not convertible terms. After conviction, judgment was respited to take the opinion of the Judges on this point; who in Easter term 1793 held that the instrument was well described, and the conviction proper.

Indictment for forging a bond, laying it to be a BOND AND *writing obligatory, is good upon the stat.* 2 Geo. 2. c. 25., *though both terms be used in the statute; a bond being a writing obligatory, though the converse do not hold generally.*

Elsworth's case, York Lent Ass. 1780, cor. Willes J. MS. Buller J. and MS. Crown Cas. Ref

An indictment stated, that an inland bill of exchange was drawn on the 23d of November, 20 Geo. 3. by Thomas Leach, and directed to Messrs. Mildred and Walker, bankers, London, requiring them to pay to J. Harrock or order 8l. two months after date, for value received (setting out the tenor of the bill). That Thomas Elseworth (the prisoner) on, &c. the said bill of exchange did feloniously *alter* and cause to be altered *by falsely making, forging, and adding* a cypher 0, to the letter and figure £. 8 in the said bill, and also by *falsely making, forging, and adding* the letter *y* to the word *eight* in the said bill mentioned, whereby the letter and figure £. 8 before written in the said bill became £. 80, and the said word *eight* before written in the said bill became *eighty;* by reason and means of which said forgeries and additions the said bill of exchange, so drawn as aforesaid for eight pounds, became and purported to be a bill of exchange

Indictment on stat. 2 Geo. 2. c. 25. *charging that the prisoner feloniously* altered *a bill of exchange*, by falsely making, forging, and adding *a cypher, &c held good; though the words of the statute are "if "any person shall "falsely make, "or forge, coun- "terfeit," &c.*

for eighty pounds; with intent to defraud Henry Garforth, &c. The ſecond count ſtated, that certain perſons unknown altered the bill (in the manner ſtated in the firſt count), and that the defendant on, &c. had in his cuſtody and poſſeſſion the ſaid falſe, forged, and altered bill, and did feloniouſly utter and puoliſh the ſame as true, with the like intent, knowing it to be forged, &c.

The priſoner being convicted, it was moved in arreſt of judgment, that as this was an indictment on the ſtat. 2 Geo. 2. c. 25. ſ. 1. the words of it muſt be ſtrictly purſued in charging the forgery; which words were, "if any "perſon ſhall falſely make, forge, or counterfeit;" (whereas the forgery alleged was, that perſons unknown did alter and cauſe to be altered, *by falſely making, forging, and adding* the cypher o to the letter and figure £.8 &c.); that it ought to have been charged that they *falſely made, forged, and counterfeited* the ſaid bill of exchange by falſely altering and adding, &c.; and that if the forgery itſelf were not alleged with ſufficient preciſion, the charge of uttering and publiſhing was alſo defective; becauſe the allegation was, that he feloniouſly uttered and publiſhed the *ſaid* falſe bill of exchange with reference to the preceding charge of forgery. That ſeveral of the ſtatutes againſt forgery had the word *alter* in them, *viz.* 8 & 9 W. 3. c. 20. *altering* or raſing the indorſement on any bank bill. 9 Ann. c. 21. ſ. 57. forging, counterfeiting, or *altering* a bond of the South-ſea company. 11 Geo. 1. c. 9. ſ. 6. *altering*, forging, or counterfeiting any bank bill; and ſtat. 15 Geo. 2. c. 13. forging, counterfeiting, or *altering* any bank bill of exchange. But that the word *alter* was not uſed in the ſtatute on which this indictment was founded. That in framing indictments on ſtatutes the conſtant practice had been in the charging part to follow ſtrictly the words of the acts, and ſo were the precedents. The counſel for the Crown admitted that this indictment was rather informally drawn; but contended that there was ſufficient alleged for the conviction of the priſoner on the ſecond count. That the falſe and fraudulent alteration of a writing to the prejudice of another man's right, was a ſufficient deſcription of a forgery at common law; and that the uttering or publiſhing, of which the priſoner was found guilty, was charged in the preciſe words of the ſtatute, viz.

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viz. that he feloniously uttered and published a false, forged, altered, and counterfeited, &c. bill of exchange as true, knowing the same to be false, &c. Execution being respited by Willes J. in order to take the opinion of the Judges; on the 12th of April 1780 all held that the indictment was good; and the offence sufficiently proved upon the second count: for there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering by falsely making and forging, or for feloniously making and forging by falsely altering, &c.

Vide S. C. post, 989. for another objection.

Crutchfield's case, ante, 895.

So in Crutchfield's case, who was indicted for forging a stamp on foreign muslins; the indictment, stating the duty to be chargeable *for*, *on*, *and in respect of* foreign muslin, was holden good; though the words of the statute in the clause imposing the duty are *for and upon*, in other clauses *for*, in others *on*, in others *upon*.

Stocker's case, Salk. 342. 5 Mod. 137. Walcot's case, Holt's Rep. 345.

But where the indictment stated that the defendant forged *or* caused to be forged a bill of lading, it was holden bad for uncertainty.

§ 59. *Intent to defraud*, ante, 854.

The intent to defraud, which has been touched upon before, must be stated in the indictment, and pointed at the particular person or persons against whom it is meditated; and the proof must tally with such averment, otherwise the prisoner will be entitled to an acquittal.

Rex v. Harrison, O. B. 1777, MS. Buller J. (1 Leach, 215. S. C.) Ante, f. 36. S.C. on another point.

Harrison was indicted for forging a receipt upon the stat. 7 Geo. 2. which makes it felony to forge such receipt with intent to defraud *any person*. Some of the counts in the indictment laid the offence to be with intent to defraud the London Assurance Company and the Bank of England alternately. It was objected, that a company or corporation was not a person: and that the Legislature had so decided by passing the stat. 31 Geo. 2. c. 22. f. 78. which after reciting that doubts had arisen whether the word *person* in the stat. 2 Geo. 2. c. 25. extended to corporations or companies, enacted, that they who were convicted of the offences in that statute should have the same punishment if they committed them against a company or corporation as if against any person: but it did not mention the offences comprised in the stat. 7 Geo. 2. The Court reserved this point for the opinion of all the Judges, who decided in favour of the prisoner,

foner; and he was discharged. Shortly after the stat. 18 Geo. 3. c. 18. was passed to remedy this defect.

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Indictment and evidence.
Intent to defraud.

But the indictment need not state the manner in which the party is to be defrauded, for that is matter of evidence.

Manner of defrauding.

In Powell's case one of the objections was, that it was not averred that T. Barrow, whose name appeared to be signed to the forged receipt, meant Taylor Barrow, with intent to defraud whom the forgery was laid in one of the counts. That the manner in which the forged receipt of stock was to operate in prejudice of Mr. Barrow ought to have been averred in the indictment; which should have stated that Taylor Barrow was the proprietor of so much stock; that the prisoner personated him in the sale and transfer, &c., and transferred it to such a person in his name, &c.; and it was not sufficient merely to state that the forgery was committed with intent to defraud T. B. generally. But it was holden sufficient by the Judges that the offence was described in the words of the act: and that whether it were or were not meant to defraud Taylor Barrow was matter of evidence, which the jury had found. Besides there was a second count, wherein it was laid with intent to defraud one Sykes. If therefore there were no such person as Taylor Barrow, or if he had no stock, yet as the receipt had in form the constituent parts of a receipt for the transfer of East India stock, that was sufficient.

Powell's case, ante, f. 53.

So in Elsworth's case before mentioned, Buller J. upon the conference started a similar objection, that it was not stated that the bill was uttered or tendered to the persons whom it was laid the prisoner meant to defraud; and therefore that it did not appear to the Court on the face of the indictment that the transaction was such as those persons could be defrauded by it; which always was the case where the name of a drawer, acceptor, or indorser is forged. But all the other Judges held that the indictment was good also in this respect; for it was sufficient to pursue the words of the act which constitute the offence, and it was matter of evidence whether the prisoner intended to defraud the persons named by tendering the bill in payment to them, or how otherwise.

Elsworth's case, ante, f. 58.
In Indictment for uttering and publishing a forged bill of exchange it need not be averred that the bill was tendered to the party, with intent to defraud whom the offence is laid to have been committed, nor in what other manner he could be defrauded, though his name did not appear on the bill; for that is matter of evidence.

As

Ch. XIX. § 60. *Indictment and evidence. Persons defrauded.*

As to the manner of describing the persons against whom the forgery is intended to operate, the following cases have occurred.

§ 60. *Description of persons defrauded, &c.*

Henry Lovell was indicted for forging an order for payment of money, purporting, as the indictment described, to be an order under the hand of Henry Harvey Aston, and directed to *Messrs. Drummond and Company*, Charing-cross, by the name of Mr. Drummond, Charing-cross, by which said order, &c. *the said Messrs. Drummond and Company* were required to pay the bearer, or order, the sum of £. 16 : 10; which said order, &c. is as follows, viz.

R. v. Lovell, O.B. Sept. 1782, MS. Gould and Buller Js. MS. Crown Cas. Ref. and MS. Jud. (1 Leach, 282. S. C.)

An indictment stating that a forged order was directed to Messrs. Drummond and Company, *by the name of, &c. is sufficiently certain.*

" Mr. Drummond, Charing-cross. 25th August 1782.

" Please to pay the bearer, or order, on demand £. 16 : 16

" and place it to account, per me, H. H. Aston."

with intent to defraud H. H. Aston. The second count was for uttering the said order, and laid like the first. The third and fourth counts were like the preceding ones, but laid with intent to defraud Robert Drummond and the other partners in the house by name. There were other counts, laid as the first in manner above specified. After conviction a motion was made in arrest of judgment, that the indictment charged the note to be drawn on *Drummond and Company* by the name of *Mr. Drummond, Charing-cross*, whereas the names of the respective partners ought to have been mentioned, instead of giving the short description of *Drummond and Company:* and it was alleged that on search of precedents none could be found of an indictment drawn in this form. At a conference of the Judges on 6th Nov. 1782, they all held the indictment good. The question was, whether any person or persons were described by the words, " *Messrs. Drummond and Company*," or whether they were totally unintelligible, and a description of nobody. The Judges said they must understand them as every body else did, namely, as meaning the partners in the partnership in the banking house, it being a sensible and certain pointing out of the persons intended by the draft; and it was not necessary to state by name who those partners were in that part of the indictment. Gould J. said, that to require the particularizing of all the partners would be of dangerous consequence to such prosecutions; some of them might not be known. And it also seemed to Buller J. and other Judges

Ch. XIX. § 60. *Indictment and evidence. Perſons defrauded.*

Judges that if the words "Meſſrs. Drummond and Com- "pany, Charing-croſs, by the name of," had been omitted, and the indictment had only ſtated, according to the fact, that the bill was directed to Mr. Drummond, Charing-croſs, it would have been ſufficient: and as the indictment was framed, the only queſtion was, whether Drummond and Company were meant by the priſoner, which was eſtabliſhed by the verdict.

Jones and Palmer's caſe, O. B. 1785, cor. Eyre B. 1 Leach, 405. *Indictment for forging an indenture of apprenticeſhip and a receipt for money, with intent to defraud A. B. C., &c. the ſtewards of the feaſt of the Sons of the Clergy ſuſtained by proof that the ſtewards had the diſpoſition of a charitable fund raiſed by voluntary contribution, out of which the apprentice fee ſought to be obtained by the forgery was to be taken. Vide* Thomas's caſe, ante, f. 36.

Mary Jones and Henry Palmer were indicted for forging an indenture of apprenticeſhip, and alſo a receipt for money, with intent to defraud A. B., &c. *the ſtewards of the feaſt of the ſons of the clergy.* The charitable fund of the ſons of the clergy is raiſed by voluntary contributions, and allotted by the ſecretary equally among all the ſtewards, to be diſpoſed of by them to the widows and children of deceaſed clergymen, according to their diſcretion. The priſoner Jones was a clergyman's widow, and pretending by means of theſe indentures and the receipt indorſed thereon that ſhe had placed her ſon as an apprentice, ſhe obtained in concert with the other priſoner an order from one of the ſtewards on the treaſurer of the ſociety for 20l. as an apprentice fee. The forgeries were clearly proved, and the priſoners found guilty. But it was ſubmitted that the offence amounted only to a miſdemeanor at common law, and that this was not ſuch a ſpecies of property as fell within any of the acts relating to forgery. But by Eyre B. forgery is the falſe making of an inſtrument, which purports on the face of it to be good and valid for the purpoſes for which it was created, with a deſign to defraud any perſon or perſons. The ſtatutes 31 Geo. 2. c. 22. ſ. 78. and the ſtat. 18 Geo. 3. c. 18. were made to prevent any doubt whether the aggregate members of a corporation, which is a body politic, were included under the words "*perſon or perſons;*" for where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compoſe it. But in the preſent caſe the ſeveral ſtewards were the abſolute owners of their reſpective ſhares of the fund: it was their money, put into their hands upon a truſt, and if they had ſunk it improperly or paid it wrongfully, they would perhaps be anſwerable: but unqueſtionably it was their money as againſt all the world, except the ſubſcribers.

It

Ch. XIX. § 61. *Indictment and evidence.*

§ 61. *Proof of the act of forgery within the county*

It seldom happens that direct proof can be given of the very act of forgery; and where the forger is not the utterer, a difficulty has sometimes occurred as to what shall be deemed sufficient evidence of the fact of forging *within the county laid*, a difficulty which does not occur upon the issue of non assumpsit, in an action upon such an instrument, the action being transitory.

Parkes' and Brown's case, ante, f. 49. MS. Jud. *Finding a note forged by* A. *in the hands of* B. *who uttered it in the county of* M, *in which also* A. *was, though not present at the fact of the uttering, is no evidence of the note having been forged by* A. *in that county; though other notes of the same kind were there found upon him.*

Parkes and Brown, whose case was before noted for another point, were indicted, the first for forging, the other for uttering a forged promissory note for five guineas. There was no doubt of Parkes having forged the note in the same name as the other prisoner, and with his concurrence, but pretended by the latter when he uttered it to be the note of his brother, whom he represented as a man of fortune in a lucrative employment. The venue was laid in Middlesex, but the only evidence which was offered to shew that the forgery was committed there, was that Brown, between whom and Parkes an intimate connexion was proved to exist, had uttered it in Middlesex, (Parkes not being present at the time, nor for aught appeared cognizant of the fact); and that upwards of forty of the same sort of five guinea notes in blank, without any signature, were found upon Parkes in the same county; all of which notes as well as the one in question were dated "Ringhton, Salop;" and also a receipt was found upon Parkes under cover, addressed to Brown, for 21*l.* for 4 five guinea bills. Both the prisoners were convicted. But after argument in the Exchequer-chamber a majority of the Judges held the conviction wrong as to Parkes; there being no evidence that the forgery was committed by him *in Middlesex*, where it was laid. For they thought that the bare fact of the note being uttered there by the other prisoner, taking him even to be an accomplice, was no evidence of the forgery itself having been committed there. But some of the Judges were not satisfied with this opinion, thinking that the fact of finding the forged instrument in the county, in which also it appeared that the forger himself was, was evidence, in the absence of other proof, of the fact of the forgery having been there committed. The majority agreed that it was a question of evidence for the jury; but thought that there was no proof in this case to warrant the conclusion.

IX. *As-*

IX. *As to the Competency of Witneſſes to the Fact of the Forgery.*

§ 62. *Witneſſes.* Watt's caſe, Hard. 332. pl. 7. 3 Salk. 172. pl. 4 *Vi.* 2 MS. Sum. 346.

There is ſome difficulty upon this point, not in aſcertaining the practice which has long prevailed; for that has been uniform in rejecting every witneſs who is intereſted, at the time of his examination, in ſetting aſide the inſtrument alleged to be forged, upon which if genuine he would be liable to be ſued; but in reconciling that practice in all caſes with the principle laid down in Abrahams v. Bunn, Bent v. Baker, Smith v. Prager, and that claſs of caſes, by which it is now ſettled as a general rule that unleſs the witneſs is to derive an immediate advantage from the verdict, if favourable, or can give it in evidence on his own behalf in any other ſuit to which he is a party, the objection of intereſt only goes to his credit and not to his competency. The rules of evidence are ſaid to be the ſame in criminal as in civil caſes; and as the object muſt be the ſame in both, to arrive at truth, there is nothing in reaſon to eſtabliſh a difference, unleſs where the neceſſity of the caſe furniſhes an exception in admitting the party injured to give evidence againſt an offender from whoſe conviction he is to derive ſome advantage to himſelf, ne maleficia remaneant impunita. That reaſon however does not hold in the preſent caſe for the admiſſibility of the witneſs whoſe hand-writing has been forged; for although he muſt neceſſarily know with more certainty than any other, whether the inſtrument be or be not of his own making; yet as in many inſtances he has a direct intereſt in ſetting it aſide, and as the fact of his hand-writing may be aſcertained with reaſonable certainty by others, the common and primary rule of law prevails, that where ſuch intereſt appears the party is incompetent to depoſe to any fact which goes to diſprove the genuineneſs of the inſtrument.

4 Burr 2255. 3 Term Rep. 27. 308 & 7 Term Rep. 60.

Attorney-General v. Le Merchant, Exch. Dec. 1792. 2 Term Rep. 201. n.

If it were even admitted that this practice is in ſome inſtances not altogether reconcileable with the rule before mentioned, as laid down in Bent and Baker and the other caſes, it might be ſufficient to ſay that the long continuance and univerſality of ſuch practice has now fully eſtabliſhed the caſe of forgery as an exception to that rule. But it is not ſo

Ch. XIX § 62. *Witnesses.*

clear that the rejection of the witness in this case furnishes such an exception. For without entering into the question how far a *conviction* in a criminal case, founded on disinterested testimony, would be evidence, at least primâ facie, against the convict, or those claiming under him in a civil suit upon the same instrument, where the fact of the forgery was directly in issue, (a point upon which the distinctions taken by Lord C. B. Gilbert and his reasonings thereon, as well as the opinions of others, are deserving of great consideration before it is ruled in the negative ;(*a*)) yet in all cases of felony, at least, where the forgery is of such sort that the party accused might, if the writing were genuine, have his remedy thereon against the witness, or the latter lose his remedy against him, it is clear that the witness has a direct interest in the conviction ; because the security itself as well as the remedy is lost to the offender by the attainder and forfeiture (*b*); and it cannot be presumed that the Crown, at whose instance the conviction was procured on the very ground of the falsity of the writing, would be so inconsistent with itself as to attempt to set it up again, even if it were not legally estopped by its own act on record (*c*). And even in other cases of felony, where the forgery was committed for the benefit of a third party, an interest still exists in the witness, who is bound by the writing, if genuine, to procure a conviction : for independent of the discredit thereby thrown on the instrument, which is insisted on by some as a sufficient reason in itself (*d*) for excluding such testimony ; although the conviction would in that case be no legal evidence to avoid the instrument in a civil action by or against such third person, to whom the rule of res inter alios acta would justly apply ; yet the difficulty of suing thereon or setting it up again would at least be increased from the known usual practice of the court to impound instruments found by the verdict of a jury to be forged : and the difficulty of proof also to the third party interested in the civil action might possibly be inhanced by the conviction of the fabricator for forgery, which being a species of the crimen falsi renders him in all instances an incompetent witness.

(*a*) Gilb. L. of Evidence, 25. &c. (last edit.), and 2 Bac. Abr. 614. &c and *vide* Bull. N. P 245. Watt's case, Hardr. 332. Per Holt C. J. at Guildhall, 14 Geo. 3. and S. P. 5 Ann. in C. B. 3 Com. Dig. 281. Strickland v. Ward, Winchester Sum. Ass. 1767, cor. Yates J. cited from his MS. in 7 Term Rep. 633. n. 6 Mod. 186. S. P., and Cook. v. Sholl, 5 Term R. 256. and 12 Vin. Abr. 95.

(*b*) *Vide* 2 Hawk. ch. 49 s. 9, 10.

(*c*) *Vide* Co. Lit. 352. *a.* & *b.* and 2 Inst. 39.

(*d*) *Vide* 2 Hawk. ch. 46. s. 24 and 2 MS. Sum. 346. *Sed vide* R. v. Bray, Rep. temp. Hardw. 358. and Smith v. Prager, 7 Term Rep. 63.

Vide Co. Lit *6. b.*

§ 63. *Interested witnesses not admissible.*

But on whatever grounds the interest of the party whose hand is forged may be supposed to rest, if he be in fact interested

tereſted in ſetting aſide the inſtrument, ſuppoſing it genuine, either as againſt the priſoner or any other, all the caſes eſtabliſh that his evidence is, to the point of the forgery at leaſt, inadmiſſible. I ſhall begin with ſome of the earlieſt. Ch. XIX. § 63. *Witneſſes.*

In Watt's caſe, upon an information for forgery, it was holden that no perſon who could have any advantage by the conviction could be a witneſs for the King. Watt's caſe, Hardr. 331, 2. 3 Salk. 172.

In Ruſſel's caſe, who was indicted on the ſtat. 2 Geo. 2. c. 25. for forging a certain acquittance and receipt with intent to defraud Roger Gately a ſolicitor, (the receipt containing ſeveral items of account between them for money diſburſed, &c.), Mr. Gately was ruled to be no witneſs to prove the forgery of his name ſubſcribed. Ruſſel's caſe, O. B. Feb. 1737, cor. Page J. and Carter B. 1 Leach, 10.

In Peter Caffy's caſe, upon an indictment for forging the indorſement of "Joſeph Gardiner" upon a promiſſory note made payable to him or order, held per Raymond C. J., Denton J., and Hale B., that Gardiner could not be a witneſs to prove that the hand-writing was not his, being a party intereſted. Caffy's caſe, O. B. Oct. 1737, Denton's MS. cited in Serit. Forſter's MS.

In Rhodes's caſe, upon an indictment for forging a letter of attorney to transfer ſtock in the name of Heyſham the proprietor, Mr. Juſtice Forteſcue rejected Heyſham as a witneſs to prove the forgery. Rhodes's caſe, 2 Stra. 728.

There is another caſe in print of one Robert Rhodes, before Mr. Baron Reynolds, which ſeems to have carried the rejection of a witneſs on the ground of intereſt a great way. The priſoner was tried for the forgery of a will of one Thompſon, *dated* 1736, in which he was named executor; and in order to diſprove the hand-writing of Thompſon, one Carter was called, who claimed as executor under a ſubſequent will dated 1737. His competency was objected to, becauſe he had an intereſt in eſtabliſhing the latter and invalidating the former will. To this it was anſwered, and apparently with ſome weight, that he had no manner of intereſt in overturning the firſt will; for whether it were a true or a falſe one the laſt was equally valid, if ſufficient in itſelf: and its ſufficiency could in no event depend upon the reſult of the impending trial, allowing all the weight to the verdict which it might be ſuppoſed to have; but it muſt ſtand or fall upon its own ground. The witneſs R. v. Robt. Rhodes, O. B. 1742, cor. Reynolds B. 1 Leach, 31.

Ch. XIX. § 63. *Witneſſes.*

was however rejected; but for what reaſon does not appear. Perhaps it would be difficult to ſhew how far even the credit of ſuch a witneſs was affected.

Vide Bull N. P. 284.

And if the executor be a bare truſtee, claiming no beneficial intereſt under the will, I conceive that the ſame rule which governs in civil caſes would prevail in this.

§ 64. *Incompetency as to other evidence of the fact of forgery.*

Incompetency ariſing from intereſt in the event of the verdict, where it really exiſts, extends to preclude the party from giving other evidence as well as that of negativing the hand-writing, which tends to prove the fact of the forgery. Therefore the executor of a perſon, whoſe promiſſory note had been forged, was by Mr. Baron Adams rejected as a witneſs to prove what the priſoner ſaid to him when he tendered him the note for payment.

Rex v. Geo. Bunting, Thetford, March 1767, Serjt. Forſter's MS.

§ 65. *Proof of identity or non-exiſtence of perſon whoſe name is forged.*

It being eſſential to prove the identity or non-exiſtence of the perſon whoſe name is charged to be forged, ſo far as to ſhew that it is not the hand-writing of the ſame perſon which it purports to be; it has been often in queſtion by whom, and in what manner, ſuch fact can be proved.

Sponſonby's caſe, O. B. July 1784, 1 Leach, 374.

John Sponſonby was indicted for forging an indorſement in the name of William Pearce on a bill of exchange, drawn by Richard Davis in favour of William Pearce on Crofts and Co. for four guineas. The report ſtates that William Pearce, the ſuppoſed payee, was an intimate acquaintance of Davis the drawer, and had received a letter of advice, ſignifying that ſuch a bill had been remitted to him, and deſiring him as an act of friendſhip to pay the produce to one Coles in diſcharge of a debt which Davis owed him. The bill never having come into Pearce's hands, and he having no demand on Davis for the amount, it was agreed that he was a competent witneſs to prove that the indorſement was not his hand-writing. But it being alſo neceſſary to ſhew that he was the identical William Pearce to whom the bill was made payable; and as Davis the drawer, whoſe teſtimony was conſidered as the beſt evidence of the fact, was not preſent to atteſt it; the letter of advice which Pearce had received from him was holden inſufficient for the purpoſe; and Pearce's teſtimony to ſhew the hand-writing to be forged was finally rejected: for though it might not be his hand-

writing, yet it might be the hand-writing of another Wm. Pearce to whom the bill might be payable. Ch. XIX. § 65. *Witnesses.*

Without conſidering any other point of evidence which occurred in this caſe, it may be doubted whether the fact of this Wm. Pearce being an intimate acquaintance and correſpondent of the drawer, and no evidence being given of the exiſtence of any other Wm. Pearce, to whom it might be ſuppoſed that the bill was made payable, was not ſufficient evidence of the identity of the payee: and as far as that goes his teſtimony would rather preſs againſt his intereſt than for it; though it is otherwiſe as to the falſification of the indorſement. For taking him to be the Wm. Pearce to whom the bill was made payable, if the indorſement had been genuine he would have been liable to an action at the ſuit of Davis; not having applied the money according to his order. It ſeems therefore that he had no manner of intereſt, but rather the contrary in proving himſelf to be the real payee; but that he had an intereſt or rather a bias in proving that the indorſement was not his hand-writing. *Vide* Parr's caſe, poſt. *Vide* Birt and others, Aſſignees of Glover, v. Kerſhaw, 2 Eaſt's R. 458.

And in a ſubſequent caſe in the ſame book it is reported that Iſaac Hart, a proprietor of ſtock, whoſe perſon and ſignature were aſſumed by the priſoner Parr in endeavouring to receive the dividend due to him, was examined as a witneſs to prove his identity, by teſtifying the amount of the ſtock he had at the Bank, and that the ſum for which the priſoner had obtained the dividend warrant was the exact ſum due to him at the time. But he was not examined to the falſity of the ſignature. Parr's caſe, O. B. 1787, 2 Leach, 487—491. Poſt. tit. *Falſe perſonating* S. C. for another point.

James Downes was tried upon ſeveral charges of forging, and uttering a bill of exchange in the name of Andrew Helme, with intent to defraud one Anthony; and alſo of forging and publiſhing an indorſement in the name of John Sowerby on a bill of exchange purporting to have been drawn by the ſaid A. Helme, dated 12th May 1789, and payable two months after date to the order of the ſaid John Sowerby for £. 14: 6: 6, with the like intent. Some letters of the priſoner's, written after he was apprehended, were produced, from whence it clearly appeared that the name of the drawer A. Helme was forged. One of theſe letters directed to Andrew Helme, the priſoner's uncle, containing an application from the priſoner to him to beg his uncle to Downes's caſe, Lancaſter Sum. Aſſ. 1789, cor. Wilſon J. MS. Buller J. *The drawer's name appearing to be forged on a bill as well as the indorſer's, it is no objection that the drawer was not called to prove upon whom the bill was drawn, there being two of the name at the place; and it may be ſhewn by other evidence who the priſoner meant by*

Ch. XIX. § 65. *Witneſſes.*

the perſon whoſe name be forged as the payee and indorſer.

acknowledge that it was his ſignature, in order to ſave him (the priſoner) from his impending fate, and promiſing to ſave his uncle harmleſs from the payment. In the ſame manner it appeared from the letters that the John Sowerby whoſe indorſement was intended to be counterfeited by the priſoner, was the ſon of another perſon of the ſame name in Liverpool. Anthony Bennett proved that the priſoner owing him ſome money offered him the bill in queſtion, with the indorſement thereon: and that on queſtioning him, the priſoner ſaid that the drawer Andrew Helme was a gentleman of credit at Liverpool, *and the indorſer a cheeſemonger there*, who had received the bill in payment for cheeſes; and that he might depend on it, it was a good bill. Whereupon he took it; and afterwards paid it away, and fourteen days after it became due it was returned to him as good for nothing. John Sowerby the father was then called, who ſwore that the indorſement was not his hand-writing: that he had lived 36 years in Liverpool, and knew no other perſon of the ſame name there, either a cheeſemonger or otherwiſe, except his ſon, who had left him about four months before, and afterwards carried on the ſame buſineſs of a cheeſemonger in Dean-ſtreet. That his ſon had failed, and was lately gone to Jamaica. That the indorſement was not at all like his ſon's hand-writing, and he did not believe it to be his. That the priſoner and his ſon were acquainted, and the priſoner had bought corks of him. Another witneſs alſo proved that the indorſement was not like the hand-writing of the ſon, and he did not believe it to be his.

It was objected on the part of the priſoner that A. Helme the drawer of the bill had not been called to prove what John Sowerby it was in whoſe favour the bill was drawn, as he beſt knew that fact, and therefore that his was the beſt evidence, and ſuch as the law requires. The evidence given was however left to the jury by Mr. Juſtice Wilſon, and the priſoner was thereupon found guilty. But judgment was reſpited to take the opinion of the Judges on the objection taken. In Michaelmas term 1789 all the Judges held the conviction proper; and the following reaſons were (Puller J.) aſſigned by the learned Judge by whom ſentence was afterwards paſſed. "The objection ſuppoſed that there was a genuine

genuine drawer of the bill, who it was inſiſted ought to have been called as a witneſs to prove what John Sowerby it was in whoſe favour the bill was drawn. But to this there were two anſwers. Firſt, it was apparent that the name of the drawer as well as that of the indorſer was forged by the priſoner, for he acknowledged as much in the letter under his own hand to his uncle A. Helme the ſuppoſed drawer. And if no real drawer exiſted, and the objection were allowed, it would be to excuſe one forgery becauſe another had been committed. But 2dly, the priſoner himſelf had aſcertained who was intended by the John Sowerby whoſe indorſement was forged; for when he negotiated the bill he repreſented him to be a cheeſemonger at Liverpool; and by another letter of the priſoner's it was clear that he meant Sowerby the ſon; for therein he requeſted his uncle to go to Sowerby's mother, and deſire her to ſay nothing about it, whether he had any concern or not, or whether he indorſed it or not. Then it being proved that the indorſement was not the hand-writing of Sowerby the ſon, the evidence of the forgery was full and complete, and the conviction right."

Ch. XIX. § 65. *Witneſſes.*

§ 66. *Competency of witneſs whoſe hand-writing is forged where he has no intereſt.*

But if the party whoſe hand-writing is forged have no intereſt in invalidating the inſtrument in queſtion, there is no doubt but that he is a competent witneſs: and ſome caſes appear to go the length of eſtabliſhing, that being the beſt he is the only witneſs, if living, to prove the forgery: but that is not confirmed by the current of authorities to ſuch an extent; though the teſtimony of ſuch an one, when diſintereſted, muſt doubtleſs be the moſt ſatisfactory of any on the queſtion of his own hand-writing.

Uſher's caſe, O. B 1759, cor. Lord Manſfield C. J. Smythe B. and Wilmot J. 1 Leach, 57. *One who paid a forged bill on account of the ſuppoſed acceptor, and debited his account with the payment, being afterwards ſatisfied of the for-*

On an indictment againſt Thomas Uſher for forging an acceptance to a bill of exchange, purporting to be drawn on Anthony Merry, a merchant in London, by Thomas Quilty and Co. at Malaga, and to be accepted by Mr. Merry, payable at Sir Charles Aſgill's and Co. The priſoner was proved to have received the money for the bill at the houſe of Aſgill and Co., who then believing it to be genuine had charged Mr. Merry's account with the payment; but being afterwards fully perſuaded that it was a forgery, they had given Mr. Merry's account credit for the ſame ſum. Mr. Merry

Ch. XIX. § 66. *Witneſſes.*

himſelf was called to prove the acceptance in his name to be forged, which was objected to on behalf of the priſoner without a releaſe from Aſgill and Co. The Court however admitted his teſtimony, on the ground that having been allowed the money in account with Aſgill's houſe, with a knowledge of all the circumſtances, there could be no demand upon him for the amount whether the priſoner were convicted or acquitted, and therefore he was not intereſted in the event.

gery, and having credited the account with the ſame ſum, thereby rendered the acceptor a competent witneſs to prove the acceptance a forgery without a releaſe to him.

Teſtick's caſe, 1774, ante, ſ 36. 12 Mod. 338. S. P.

So in Teſtick's caſe before mentioned, the perſon in whoſe name the receipt was forged, having been paid the money by the debtor in fraud of whom the forgery was committed, was admitted as a witneſs.

Again, where one was indicted for forging a receipt, and the perſon whoſe name was forged had before recovered the money from the priſoner, he was admitted as a witneſs by Lord C. J. Willes to prove the forgery.

Wells's caſe, at Oxford, Bull. Ni. Pr. 289. and *vide* Lord C. J. Treby's opinion in Dean's caſe, E. 8 W. 3. 12 Vin. Abr. 23.

§ 67.

In the caſe of Captain Smith, who was tried for uttering a forged receipt of one George Maughan a butcher, at the iſland of Grenada, upon a bill for butcher's meat ſupplied to the ſhip of which the priſoner was captain; the charge was for altering the figures in the quantity of meat, and in the ſums they amounted to, with intent to charge one Trinder, the owner of the ſhip, with larger diſburſements than the captain had really laid out. And to prove that theſe alterations were forgeries, and not the hand-writing of Maughan, one Greenwood his partner was produced, as one who was acquainted with Maughan's hand. Sir Fletcher Norton, for the priſoner, objected, that Maughan himſelf ought to be produced, or ſome reaſon given why he could not. The proſecutor alleged that he was dead, but on the ſingle hearſay of Greenwood, who left him alive about two years and a half before. Gould and Yates Juſtices were of opinion that ſuch evidence was no ſufficient proof of Maughan's death; and that without that proof no evidence but *his* could in this caſe be admitted of the forgery: for Maughan's teſtimony would certainly be the beſt, as he could ſay poſitively whether the hand-writing were his or not; but Greenwood could only ſpeak from opinion: and it was an eſtabliſhed rule, that in all caſes the beſt evidence be given which the caſe will admit of, and leſs than that

Captain Smith's caſe, O. B. 16th Jan. 1768, 2 MS. Sum. 503. *One whoſe voucher is forged for the purpoſe of impoſing on a third perſon, with whom he had no dealing, and to whom he could in no event be reſponſible, is the proper witneſs to prove the forgery of his own hand-writing.*

was

was never to be received, if it appeared that a better might have been had. And in this case there was not the same reason for not producing Maughan which commonly occurred in prosecutions for forgeries, which were generally by the party himself whose hand was forged, and were pointed at an intention to defraud that party: and in those cases there was certainly no necessity that the person whose hand-writing was forged should himself appear to prove the forgery; but the fact might be proved by others who were acquainted with his hand. That the reason was, because in such prosecutions the party himself, whose hand-writing was forged, would be no competent witness, being interested in the question: and therefore the testimony of those who were acquainted with his hand was really the best evidence which the case would admit of. As, therefore, the party himself could not be examined if he were present, it was a sufficient reason for not producing him at all on the part of the prosecution. But in the present case Maughan had no degree of interest at stake: whatever was the true amount of the bill he had been paid it, and had no demand at all subsisting. The question was only between the prisoner and Trinder; whether the prisoner had overcharged his disbursements, and had produced false vouchers in his accounts with Trinder: and upon such a question Maughan might certainly have been a competent witness, and he certainly could give the best and most satisfactory evidence, whether the alterations in his bill were corrections of his own, or were forged by some other hand. Accordingly the evidence of Greenwood was rejected, and the prisoner was acquitted.

Ch. XIX. § 67. *Witnesses.*

In Coogan's case, Gibson, the supposed testator, proved the will to be a forgery. So it was in Stirling's case, where Mrs. Shuter appeared in court, and gave evidence of the forgery.

Coogan's case, O. B. 1787, MS. Buller *J.* ante, f. 43 (2 Leach, 503. S. C.)

Stirling's case, O. B. 1773, ante, f. 43. and Murphy's case, ibid.

§ 68.

Newland was indicted for forging a bank note, signed "Wm. Lander. For the Govr. and Company of the Bank "of England." Lander, who was a cashier of the Bank, properly authorised to subscribe such notes with his own name, for the governor and company, and who had given security to them for the faithful performance of this duty,

Rex v. Abraham Newland, O. B. Feb. 1784, 1 Leach, 350.

was

Ch. XIX. § 68. *Witneſſes.*

was called as a witneſs to prove the forgery of the bank note, and that the name "*Wm. Lander*" ſubſcribed thereto was not his hand-writing. His competency was objected to, upon the intereſt which he was alleged to have in the event of the proſecution: for upon a ſuppoſition that he had ſigned the note, without carrying it to the account of the Bank, he would be liable as well to a criminal proſecution for the fraud, as to a civil action on his ſecurity bonds, &c. To this it was anſwered on the part of the proſecution, that the witneſs had no direct intereſt in the queſtion: for whether the note were genuine or not, he could never be reſponſible for the payment of it. That the very objection was founded upon the preſumption of a breach of truſt, which could not be entertained upon any legal principle; and therefore an intereſt could not be inferred from ſuch a preſumption. Mr. Baron Perryn and Mr. Serjeant Adair, Recorder, admitted the witneſs, upon the ground that he was in no event reſponſible for the payment of the note in queſtion. They ſaid that the intereſt muſt be apparent upon the face of the inſtrument itſelf, or ariſe immediately from the nature of the tranſaction, or from the acknowledgment of the party himſelf. That in the preſent caſe, unleſs criminality were preſumed, no intereſt could be inferred, and ſuch a preſumption was repugnant to law.

The caſhier of the Bank who ſigns notes for the Governor and Company, is a competent witneſs to prove his hand-writing a forgery.

Hughes's caſe, Exeter Sp. Aſſ. 1802.

But in Hughes' caſe, on a ſimilar proſecution, Le Blanc J. held that the hand-writing of the caſhier of the Bank might be diſproved by any other perſon who was acquainted with his hand-writing. And in the caſe of Dennis M'Guire, a conviction for forging a bank note was eſtabliſhed on reference to the Judges, without the aid of the caſhier's teſtimony to diſprove his hand-writing, the forgery of which was eſtabliſhed by other evidence, which ſhewed that the inſtrument was falſe in all its parts, in the texture of the paper, the water mark, the engraving, the ink, and the written date of the year, which was 1798, though the printed date under the Britannia was 1799; being altogether proved to be ſuch as the Bank never made or iſſued.

M'Guire's caſe, Lancaſter Sp. Aſſ. 1801. cor. Chambre J. MS. Jud.

§ 69. *Releaſe, &c.*

But whatever might have been the intereſt of the party in the tranſaction at firſt, there is no doubt but if he be diveſted of ſuch intereſt by releaſe, payment, or otherwiſe, at

at the time he is ready to be ſworn, it is no objection to his competency, whatever it may be, under certain circumſtances to his credit. Therefore a releaſe from the holder of a promiſſory note to the ſuppoſed drawer, in whoſe name it was forged, there being no other name on the note to whom the drawer could be liable, made him a competent witneſs to prove the forgery of his hand-writing upon an indictment againſt the priſoner, who had paſſed it off to ſuch holder without any indorſement. In Dr. Dodd's caſe, the Earl of Cheſterfield, the ſuppoſed obligor of the forged bond, was admitted to diſprove his ſignature, on producing a releaſe from Fletcher, the ſuppoſed obligee.

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Akehurſt's caſe, Suſſex Sum. Aſſ. 1776, cor. Ld. Mansfield C. J. 1 Leach, 178.

Dr. Dodd's caſe, O. B. Feb. 1777, 1 Leach, 187.

X. *Judgment and its Conſequences.* § 70.

In a variety of inſtances, the forgery of particular inſtruments has been made felony by ſtatute, for the moſt part excluding the benefit of clergy: theſe have been ſeverally mentioned under their appropriate heads. In all other caſes the offence muſt be taken at this day to reſt in miſdemeanor, puniſhable at common law by fine, impriſonment, and ſuch other corporal puniſhment as the Court in their diſcretion ſhall award; and by ſtatute alſo with certain puniſhments of the ſame kind in particular inſtances, which have alſo been pointed out.

Vide ante, ſ. 1. 1 Hawk. ch. 70. ſ. 1. 4 Blac. Com. 247. 3 Bac. Abr. 277.

One of the conſequences of any judgment for this offence is an incapacity to be a witneſs, until reſtored to competency by the king's pardon, under the great ſeal, &c.

5 Com Dig. Teſtmoigne, A. 3, 4. Co. Lit. 6. *b.*

Alſo by ſtat. 12 Geo. 1. c. 29. in caſe perſons convicted of forgery ſhall afterwards practiſe as attornies, ſolicitors, or law agents, the Court where the ſuit or action is brought ſhall, on complaint, examine the matter ſummarily, and cauſe the offender to be tranſported for ſeven years.

12 Geo. 1. c. 29. *Attornies, &c. practiſing after conviction for forgery to be tranſported.*

CHAP. XX.

FALSELY PERSONATING ANOTHER.

Affimilated to Forgery. - - § 1.
1. *Falſely perſonating the Proprietors of Stock* claſſed with Forgery, and made a capital Felony by Statute. *ib.*
What *an Endeavour to receive* the Money of Stockholders by falſe perſonating, under the ſeveral Statutes. - - - - § 2.
The real Proprietor *a Witneſs* to prove his holding the Stock. *ib.*
2. *Perſonating Seamen, &c. and Out-Penſioners of Greenwich Hoſpital*, made capital Felonies by Statutes. § 3.
Such perſonating muſt be in order to receive Wages, &c. due, or ſuppoſed to be due. *ib.*
It muſt be a perſonating of an exiſting Perſon entitled, or who primâ facie might be entitled to ſuch Wages, &c. - - - - § 4.
3. *Acknowledging any Fine, Recovery, Deed enrolled, Statute, Recognizance, Bail, or Judgment in another's Name*, without his Aſſent, Felony by Stat. 21 Jac. 1. c. 26. - - § 5.
Extended to bail before Commiſſioners or Juſtices of Aſſize by Stat. 4 & 5 W. & M. c. 4. *ib.*
Conſtruction thereof. *ib.*
4. In all other Caſes, though done for fraudulent Purpoſe, not more than *Miſdemeanor at common Law*, grounded on Conſpiracy and Cheating, or under Circumſtances affecting the Public. - § 6.

Falſely perſonating another.

§ 1.

Falſely perſonating proprietors of public ſtocks claſſed with forgery.

THIS offence, committed for the purpoſe of cheating another, by impoſing on him a falſe name or character, for the purpoſe either of gaining a new credit or preventing

venting detection, is in its nature nearly allied to forgery, with which it is usually accompanied, to give it efficacy. They have been accordingly classed together by the legislature in various instances, which have been already mentioned, with respect to personating the proprietors of government stocks, or the stocks of the different public companies; all which are made capital felonies. By referring to the terms of the stats. 8 Geo. 1. c. 22. s. 1. 31 Geo. 2. c. 22. s. 77. the 4 Geo. 3. c. 25. s. 15. and other acts, it will be seen that the actual completion of the fraud by the transfer of the stock or the receipt of the dividends, is not necessary to constitute the offence. It is sufficient if the offender "falsely and deceitfully personate any true and "real proprietors of the said shares in stock annuities and "dividends (*a*), or any of them, or any part thereof, *and* "*thereby transferring*, or *endeavouring to transfer*, the stock, "or *receiving*, or *endeavouring to receive* the money of such "true and lawful proprietor, as if such offender were the "true and lawful owner thereof," &c.: in which case every offender is by the several acts made guilty of felony without benefit of clergy.

Ch. XX. § 1.

Vide ante, tit. *Forgery*, p. 853. and s. 46. to 50. inclusive.

Ante, tit. *Forgery*, s. 9. 25. 28.

Vide 8 Geo. 1. c. 22. &c. ante, tit. *Forgery*, s. 9. p. 867.

§ 2.

What is an endeavour to receive, &c. by false personating.

As to what amounts to an *endeavour to receive*, &c. by false personating under these acts.

Parr's case, O.B. 1787, MS. Buller J. (2 Leach, 487. S. C.)

Francis Parr was indicted on the stat. 31 Geo. 2. c. 22. s. 77. for personating Isaac Hart, the real proprietor of 3900*l.* capital stock in the 3 per cent. consol. ann., and thereby *endeavouring to receive* 58*l.* 10*s.*, half a year's dividend on the said stock, being the money of the said I. H.

Obtaining a dividend warrant in the name of a real proprietor is an endeavouring to receive the money of such proprietor, within the stat. 31 Geo. 2. c. 22. s. 77.; *though the party were apprehended before he had taken any subsequent step towards obtaining the actual payment of the money made payable thereby at the pay-office.*

The case in proof was, that the prisoner had applied to the clerk, whose business it was to issue the dividend warrants upon that stock, in the name of Isaac Hart, for a warrant for half a year's dividend. The words used by the prisoner were, "Isaac Hart £.3900;" and he signed the book "Isaac Hart." Being asked of what place, he said of Windsor; which agreeing with the description in the book, a warrant was made out for 58*l.* 10*s.*, to which he again signed "*Isaac Hart*," and which was then delivered to him,

(*a*) This by stat. 31 Geo. 2. c. 22. s. 77. extends as well to stocks and funds thereafter to be established by authority of parliament, as to those then established.

Ch. XX. § 2. *Stockholders.*

him, and entitled the bearer to receive that sum at the pay-office. He was apprehended some minutes after, without its appearing that he had made any application at the pay-office, or had even gone towards it, or taken any step whatever after receiving the dividend warrant towards obtaining the actual payment of the money made payable thereby; which it was objected by the prisoner's counsel was necessary to the completion of the offence. The jury found him guilty, subject to the opinion of the Judges on the question, whether these circumstances amounted to *an endeavour to receive the money* of I. H. within the true intent and meaning of the act? And in Hilary term 1787 all the Judges held the conviction right.

Vide 2 Leach, 490.

Mr. Justice Gould, in delivering their opinion at the O. B. in February 1787, observed that the very object of the Legislature was to prevent the completion of the mischief, if possible, by prohibiting even the *endeavour* to obtain the property of others in the funds. That the very statement of the facts shewed that the prisoner, by personating the proprietor and by obtaining and indorsing the warrant as such, thereby made an *endeavour*, as far as it went, towards receiving the dividend.

Witness. *Vide* tit. *Forgery*, p. 997.

In that case it is to be remarked, that Isaac Hart the proprietor was examined as a witness to prove the identity of the person intended to be defrauded.

§ 3. *Personating seamen, &c.* Ante, ch. 19. s. 25. 31 G. 2. c. 10. s. 24.

It has also been shewn that "whosoever willingly and "knowingly shall personate or falsely assume the name or "character of, or procure any other to personate or falsely "to assume the name or character of any officer, seaman, or "other person entitled or supposed to be entitled to any "wages, pay, or other allowance of money or prize money, "for service done on board of any of the King's ships or "vessels, or the executor, or administrator, wife, relation, "or creditor, of any such officer or seaman, or other per-"son, in order to receive any wages, pay, or other allow-"ance of money, or prize money, due, or supposed to be "due or payable, for or on account of the services of any "such officer, or seaman, or other person, as aforesaid; "shall (on conviction) be deemed guilty of felony without

" benefit of clergy," by stat. 31 Geo. 2. c. 10. s. 24. and other acts. In addition to which,

Ch. XX. § 3. *Seamen and marines, &c.*

By stat. 3 Geo. 3. c. 16. s. 6. " Whosoever willingly and " knowingly shall personate, or falsely assume the name or " character of, or procure any other to personate, or falsely " to assume the name and character of, any person entitled, " or supposed to be entitled, as an out-pensioner, to any " out-pension or allowance of money from the commission- " ers or governors of Greenwich Hospital, in order to re- " ceive the money due or supposed to be due on such out- " pension, every such person so offending, and being lawfully " convicted of any such offence, shall be deemed guilty of " felony without benefit of clergy."

Out-pensioners of Greenwich Hospital. 3 Geo. 3. c. 16.

§ 4.

The false personating must be in order to receive the wages, &c. due or supposed to be due.

By the words of the several statutes last above referred to, the false personating must be done *in order to receive the wages*, &c. of some seaman, &c. *entitled or supposed to be entitled* thereto: there must therefore be some evidence to shew that there was such a person of the name and character assumed, who was either entitled, or might primâ facie at least be supposed to be entitled to receive on board such a ship the wages, &c. attempted to be acquired.

Brown's case, Winchester Sp. Ass. 1800. MS. Jud.

The personating must be of some existing person entitled or who primâ facie might be entitled to receive the wages, &c. therefore it not appearing there was any such seaman on board as a certain ship as the character assumed, a conviction on the stat. was held wrong.

Charles Brown was indicted on the stat. 31 Geo. 2. c. 10. for that he willingly, knowingly, and feloniously personated and falsely assumed the name and character of Wm. Wheeler, a person supposed to be entitled to certain prize-money for service done on board his majesty's ship Terpsichore, in order to receive certain prize-money, supposed to be due and payable for and on account of the services of the said William as aforesaid, against the statute, &c. A second count charged that the prisoner feloniously forged and counterfeited, and procured to be forged and counterfeited, a certain paper-writing, purporting to be an authority from one William Wheeler, a person supposed to be entitled to certain prize-money on board of the said ship Terpsichore, in order to receive such prize-money, supposed to be due to the said William Wheeler as aforesaid; which said forged and counterfeited paper-writing is as follows; viz. " I do " hereby authorize all whom it may concern to pay to the " order of Mr. J. Jacob, No. 2. St. George-square, Portsea, " navy agent, the prize-money due to me as a marine on " board

Ch. XX. § 4. *Seamen and marines, &c.*

" board his majesty's ship Terpsichore, for the capture " of all prizes between 26th Nov. 1793 till 13th August " 1798; dated 10th January 1800; for which this shall be " a sufficient warrant.

his

" Wm. ⋈ Wheeler,

mark."

against the statute, &c. A third count was for knowingly uttering the same, with intent to defraud Judah Jacob; against the statute, &c.

It appeared in evidence that on the 10th of January 1800 the prisoner came to Judah Jacob's house, who was a navy-agent at Portsea, and told his wife that his name was William Wheeler, and that he was entitled to prize from the Terpsichore. He produced a certificate to that effect, from which she filled up an order in the usual form, and gave it to him to take to the dock-yard to sign. He accordingly took it away, and afterwards brought it back, (being the order set forth in the second count), saying it had been signed by him, and a gentleman in the dock-yard had witnessed it; and pleading distress, he received from her 5 s. in advance. The certificate produced by the prisoner was proved to have been signed by the proper officer, but he did not know the prisoner's person at the trial. It appeared afterwards that his name was Brown. Being convicted on the two first counts, it was objected, first, that there was no evidence that William Wheeler ever served on board the Terpsichore in any capacity, or indeed that any such person existed. Secondly, that the personating intended by the statute was a personating in order to the party's personally receiving the money of those who had authority to issue it, and not as in this case an assumption of the character in the act of forging an authority for another to receive it, with intent to cheat such third person. Thirdly, that there was an omission in the second count of the word witness, under which the attesting witness's name was to have been written, which word was in the paper signed by the prisoner. The Judges on conference in Easter term 1800 held that the conviction was wrong; there being no evidence that there was any such person as Wm. Wheeler who either was entitled or at least primâ facie entitled to prize-money, as a seaman on board the Terpsichore.

(*Vid.* 9 Geo. 3. c. 30. s. 6.)

A similar

A similar case of one Charles M'Annelly was submitted to the consideration of the Judges at the same time, and received a like determination. Ch XX. § 4. *Seamen and marines.*

§ 5. *Acknowledging deeds, fines, bail, &c. in another name.* 21 Jac. 1. c. 26.

By stat. 21 Jac. 1. c. 26. s. 2. "All and every person "and persons who shall acknowledge or procure to be acknowledged any fine, recovery, deed enrolled, statute, "recognizance, bail, or judgment, in the name or names "of any other person or persons not privy or consenting to "the same; and being thereof lawfully convicted or attainted, shall be adjudged felons, without benefit of "clergy;" (saving corruption of blood and loss of dower). Sect. 3. provides that the act "shall not extend to any "judgment acknowledged by any attorney of record for "any person against whom any such judgment shall be "given."

This act extended only to proceedings in the courts themselves: and therefore by stat. 4 W. & M. c. 4. s. 1. the Chief Justices of B. R. and C. B., and the Chief Baron, may respectively, together with one other Judge of their respective courts, appoint commissioners (other than common attornies and solicitors) in every shire and county within England, Wales, &c. to take recognizances of special bail or bail pieces in actions and suits depending in their several courts. And by s. 3. any Judge of assize in his circuit is empowered to take such recognizances. Then by s. 4. "any person or persons who shall, before any person or "persons empowered by virtue of this act as aforesaid to "take bail or bails, represent or personate any other person "or persons, whereby the person or persons so represented "and personated may be liable to the payment of any sum "of money for debt or damages to be recovered in the "same suit or action wherein such person or persons are "represented and personated, as if they had really acknowledged and entered into the same; being lawfully convicted thereof, shall be adjudged felons, and suffer, &c. "as felons," &c. 4 Blac. Com. 128. 4 W. & M. c. 4.

Under the act of King James, it has been holden that the bare personating of bail before a Judge at chambers, or the acknowledging thereof in another name, is no felony unless the 1 Hawk. ch. 45. s. 10. 1 Hale, 696 Timeerly's case, 2 Sid. 90.

Ch. XX. § 5. *Bail.*

the bail be filed; but only a misdemeanor. But in Beasly's case, though the bail-piece were filed at Westminster, the trial was had in London, the county where the bail was personated; though according to the report of the same case in Ventris, Twisden J. said that it must be tried in Middlesex where the bail-piece was filed; the entry being, venit coram domino rege, &c. Where bail was put in under feigned names, there being no such persons, it was holden not to be within the act; but the court of C. B. ordered the bail and the attorney to be set in the pillory.

Beasley's case, O. B. 28 Car. 2. T Jones, 64. *Sed vide* 2 Ventr. 301. S. C.

Anonymous, 1 Str. 384.

§ 6. *At common law.*

In all other cases, not made felony by statute, the bare fact of personating another, though for the purpose of fraud, can in no instance amount to more than a cheat or misdemeanor at common law, and punishable as such. It was so considered in the case of John Hevey, who was acquitted on the first indictment against him for forgery; it appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person. Neither indeed did the second indictment against him for the misdemeanor turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as cheat, upon which they were all convicted.

Ante, *Forgery*, s. 5. p. 856.

So where a woman living in the service of her master conspired with another man that he should personate her master, and in that character should solemnize a marriage with her; which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And such I have before shewn was the true ground of the judgment in the case of Macarty and Fordenbourgh.

Rex v. Robinson and Taylor, O. B. cor. Lord Ch. J. Willes, Foster J. and Reynolds B. 1 Leach, 44.

Ante, p. 823, 4.

In Dupee's case, however, where the indictment only charged that he personated one A. B., clerk to H. H., a justice of the peace, with intent to extort money from several persons in order to procure their discharge from certain misdemeanors for which they stood committed; the Court

Dupee's case, M. 12 Geo. 1. 2 Sess. Cas. 11.

Court would not quash it on motion, but put the defendant to demur to it. Ch. XX. § 6. *At common L. 20.*

It might probably have occurred to the Court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another; it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices.

CHAP. XXI.

ARSON.

At Common Law.

The malicious and voluntary burning the Houſe of another. - - - § 1.

By Statute. - - - - - § 2.

The Stat. 23 H. 8. c. 1. and 25 H. 8. c. 3., ouſting Clergy from Arſon, repealed by Stat. 1 Ed. 6. c. 12.; but Acceſſaries before ouſted of Clergy by Stat. 4 & 5 Ph. & M. c. 4. and by Implication the Principals. *ib.*

By Stat. 43 Eliz. c. 13. burning any Barn or Stack of Corn or Grain in the northern Counties, Felony without Clergy. *ib.*

By Stat. 22 & 23 Car. 2. c. 7. burning *in the Night Time* any Ricks or Stacks of Corn, Hay, or Grain, Barns, or other Outhouſes or Buildings, or Kilns, Felony; but Offender may avoid Death by chuſing to be tranſported. *ib.*

But by Stat. 9 Geo. 1. c. 22. ſetting Fire to any Houſe, Barn, or Outhouſe, or to any Hovel Cock, Mow, or Stack of Corn, Straw, Hay, or Wood; or reſcuing any Perſon in Cuſtody for the ſame; or by Gift or Promiſe, &c. procuring another to join in ſuch unlawful Act; Felony without Clergy. *ib.*

So the burning of any Mill, by Stat. 9 Geo. 3. c. 29. *ib.*

1. *The Burning muſt be malicious and wilful.* § 3.

If by Negligence or Miſchance, though amounting to a Treſpaſs, no Felony. *ib.*

Aliter, if maliciouſly intending to burn one Houſe he burn another. *ib.*

Although the Intention were only to burn his own. *ib.*

But by Stat. 6 Ann. c. 31. a Servant *negligently* ſetting Fire to Houſe or Outhouſe forfeits 100l. and to be ſent to Houſe of Correction for 18 Months. *ib.*

2. *There*

2. *There muſt be an actual Burning of Part at leaſt of the Houſe.* - - § 4.

"*Setting Fire to*" in the Stat. 9 Geo. 1. c. 22. means a *Burning*. *ib.*

Burning Paper in Paper-Mill, not ſufficient. *ib.*

3. *What the Houſe, &c.* - - § 5.

Extends to Outhouſes, Parcel of the Dwelling-houſe. *ib.*

So burning a Barn having Corn or Hay in it, Arſon at common Law. *ib.*

But ſufficient, though empty, under Stat. 9 Geo. 1.; and it is not material under that Statute whether the Fact be done in the Night or by Day. *ib.*

A common Gaol, the Entrance to which was through the Gaoler's Dwelling-houſe, held *a Houſe* within Stat. 9 Geo. 1. *ib.*

A detached Building, though Parcel of a Manſion in Law, may be charged as an *Outhouſe* under the Stat. 9 Geo. 1. *ib.*

4. *What the Houſe, &c. of another.* - § 6.

To conſtitute Felony either at common Law or by Statute, the Burning muſt be of a Houſe, &c. *in Poſſeſſion* of *another*. *ib.*

The Offence therefore cannot be committed by a Leſſee for Years, or a Mortgagor in Poſſeſſion. *ib.*

But one entitled only to Dower may commit Arſon of the Houſe in Poſſeſſion of a Leſſee; and ſo it ſeems may a Reverſioner in Fee. *ib.*

A Pauper put into a Houſe by Pariſh Officers to inhabit as a Servant may commit Arſon of it. *ib.*

But one maliciouſly burning his own Houſe, a Miſdemeanor, eſpecially if near other Houſes or Property thereby endangered. - - § 7.

And if others in fact burnt, Felony. - § 8.

Principals and Acceſſaries—Clergy. - § 9.

Principals ouſted of Clergy in all Caſes within Stat. 9 Geo. 1. c. 22. if not by prior Statutes. *ib.*

So, if required by Order of the King in Council, and neglecting to ſurrender in 40 Days. *ib.* - § 9.

Acceſſaries before to wilful burning of any Dwelling-houſe, or Barn, having Corn or Grain in it, ouſted of Clergy by Stat. 4 & 5 Ph. & M. c. 4. *ib.*

Acceſſaries after entitled to Clergy, except after the King's Proclamation as above. *ib.*

Trial. - - - § 10.

May be in any County in England.

Indictment and Evidence. - § 11.

At common Law, Offence muſt be laid to be done *wilfully* (*or voluntarily*) *and maliciouſly*, as well as *feloniouſly*. *ib.*

Indictment on the Stat. 9 Geo. 1. c. 22. laying the burning of *a Houſe*, good enough, without ſaying *Dwelling*-houſe. *ib.*

If the Burning be of an *Outhouſe*, it need not be ſhewn of what Deſcription, under the Stat. 9 Geo. 1. *ib.*

The Houſe muſt be charged to be *burned* or *ſet Fire to*. *ib.*

As to the *Intent*. *ib.*

Muſt ſhew it to be the Houſe *of another*, and ſtate to whom belonging. *ib.*

The Property muſt be laid in the actual Tenant, though only ſuch by Sufferance. *ib.*

Though laid to be done in the *Night-time*, yet not material to be proved. *ib.*

Evidence of Part of the Goods in the Houſe fired being afterwards found concealed in the Priſoner's Houſe, admitted as a Circumſtance to ſhew his Preſence at the Fact. *ib.*

Arſon.

THE offences which follow next in order are ſuch as are committed againſt property, not merely lucri cauſâ, as thoſe already noticed, but from a miſchievous or vindictive motive;

motive; and may for the moſt part be properly claſſed under the general deſcription of *malicious miſchief*, as an excellent writer has done. Of theſe the principal is the wilful and malicious burning of houſes, which is known in the law by the appropriate denomination of Arſon. And as many ſtatutes have paſſed againſt the offence of wilful and malicious burning, which have a direct reference to, and are engrafted upon, arſon properly ſo called; I ſhall here touch upon ſuch of them as are neceſſary for the elucidation of the preſent ſubject, leaving the conſideration of others till I come to treat of *malicious miſchief* in general.

4 Blac. Com. 244.

§ 1. *Arſon at common law.* 3 Inſt. 66. M. 11 H. 7. fo. 1. 1 Hale, 566. 1 Hawk. ch. 39. Sum. 85. Staundf. lib. 1. c. 33. 2 Inſt. 148. 4 Blac. Com. 220.

Arſon, which was felony at common law, and anciently puniſhed with death, is deſcribed to be the malicious and voluntary burning the houſe of another.

This definition will be examined in all its parts;

1. *As to what ſhall be ſaid to be malicious and voluntary.*
2. *What a burning.*
3. *What the houſe or other deſcription of property compriſed in this offence at common law, or in the ſtatutes aftermentioned.*
4. *What the houſe, &c. of another.*

But firſt it will be proper to collect in one view the ſeveral ſtatutes which have been paſſed relating to the ſubject more immediately under conſideration, as they ſerve to throw light upon ſome parts of it; and the ſame illuſtration will frequently apply both to the common and ſtatute law.

§ 2. *By ſtatute.* 23 Hen. 8. c. 1. 1 Hale, 571.

By the ſtat. 23 Hen. 8. c. 1. ſ. 3. "No perſon or perſons found guilty (amongſt other offences) for wilful burning of any dwelling-houſes or barns wherein any grain of corns (*a*) ſhall happen to be; nor any perſon or perſons being found guilty of any abetment, procurement, helping, maintaining, or counſelling, of or to ſuch felonies, ſhall be admitted to the benefit of clergy, &c. except perſons in holy order of ſubdeacon or above." This was

(*a*) Lord Hale, 1 vol. 571. cites the ſtatute in theſe words, "grain *or* corn." So the ſtat. 25 H. 8. c. 3. (I quote from Runnington's edition) recites the former ſtatute as having the words "*grain or corn.*" This latter is again recited in the ſtat. 5 & 6 Ed. 6. c. 10. with the words "grains or corn." And again, the ſtat. 4 & 5 Ph. & M. has the words, "corn or grain."

Ch. XXI. § 2. *By ſtatute.*

25 Hen. 8. c. 3.

extended by ſtat. 25 H. 8. c. 3. ſ. 2. to ſuch as ſtand mute, challenge peremptorily above twenty, or will not directly anſwer.

But theſe ſtatutes were certainly repealed, as to the ouſting of clergy from the offence in queſtion, by the ſtat. 1 Ed. 6. c. 12. ſ. 10. which, after taking away clergy from ſeveral felonies by name, *omitting this*, enacts that "in *all other* "caſes of felony, other than ſuch as were before mentioned," offenders ſhould "enjoy the benefit of clergy in the ſame "manner as before the firſt year of Hen. 8th." Some have thought that clergy was again ouſted, in the inſtances before enumerated, by the operation of the ſtat. 5 & 6 Ed. 6. c. 10. ſ. 4. entitled "an act for the avoiding of clergy from divers perſons;" which reciting the ſtat. 23 H. 8. c. 1. and that it was defective in not extending to caſes where perſons guilty of robbery and burglary in one county were taken with the goods in another county, and there tried and convicted of larceny; and reciting that this defect had been ſupplied by the ſtat. 25 H. 8. c. 3.; and reciting further that the act of the 1 Ed. 6. c. 12. (which omits as well to ouſt clergy from burglars and robbers taken with the goods in another county, and there tried, as from the offence of wilful burning of houſes, &c.); had reſtored clergy in all other caſes than thoſe therein mentioned, as before the firſt of H. 8., "by reaſon of which "article and clauſe the ſtat. 25 H. 8. which did put *ſuch* "felons and burglars from their clergy, that do ſuch offence "in one county, and after are taken with the goods ſtolen "in another county and there indicted, &c. was made void; "by reaſon whereof divers perſons that ſince the ſaid 1 H. 8. "have committed *ſuch robberies and burglaries* in one county, "and after have been taken with the mainer in another "county, and there indicted, &c. have had their clergy, "which they could not have had in caſe the ſaid act of the "25 H. 8. had ſtood in force; for redreſs whereof enacts, "that the ſaid ſtat. 25 H. 8. touching the putting of *ſuch* "offenders from their clergy, and every article, clauſe, or "ſentence contained in the ſame touching clergy, ſhall "from thenceforth touching *ſuch* offences remain in full "ſtrength and virtue, in ſuch manner and form as before "the making of the ſaid ſtat. 1 Ed. 6." &c.

Alex. Poulter's caſe, 11 Rep. 33—5. 1 Hale, 572. 2 Hawk. ch. 33. ſ. 42.

5 & 6 Ed. 6. c. 10.

But

But the opinion that this ſtat. revived the ſtats. 23 & 25 H. 8. in toto, as to the offence of wilful and malicious burning, is very ably controverted by Mr. Juſtice Foſter, and by Lord Hale himſelf in the ſecond part of his work; and both agree with the third reſolution in Poulter's caſe, that the ſtat. 3 & 4 Ph. & M. c. 4. after mentioned, by taking away the benefit of clergy from the acceſſary before, by neceſſary conſtruction took it from the principal in the like inſtances. But quâcunque viâ datâ, ſays Lord Hale, the law ſtands ſettled that clergy is taken away in all caſes from the principal in wilful burning of a dwellihg-houſe, or a barn with corn. However, the doubt in this reſpect probably ſuggeſted the precaution of enacting the proviſion in the ſtat. 9 Geo. 1. c. 22.

Ch. XXI. § 2. *By ſtatute.*

11 Rep. 35. Foſt. 330. &c. 2 Hale, 347. and *vide* 1 Hale, 572. 4 Blac. Com. 222.

The ſtat. 4 & 5 Ph. & M. c. 4. enacts "That all and "every perſon and perſons who ſhall maliciouſly command, "hire, or counſel, any perſon or perſons wilfully to burn "any dwelling-houſe, or any part thereof, or any barn "then having corn or grain in the ſame; that then every "ſuch offender being outlawed thereof, or being thereof "arraigned and found guilty, or being otherwiſe lawfully "attainted or convicted of the ſame offence, or being "arraigned thereof, do ſtand mute, or challenge peremptorily above 20, or will not anſwer directly to ſuch offence, "ſhall not have the benefit of clergy."

4 & 5 Ph. & M. c. 4. *Acceſſaries before.*

The ſtat. 43 Eliz. c. 13. ſ. 2. enacts, "That whoever "ſhall wilfully and of malice burn, or cauſe to be burned, "or aid, procure, or conſent, to the burning of any barn "or ſtack of corn or grain, within Cumberland, Northumberland, Weſtmorland, or Durham, and ſhall be indicted "thereof and convicted, or ſhall ſtand mute, or challenge "peremptorily above 20, before the juſtices of aſſize, gaol-"delivery, oyer and terminer, or of the peace, &c. ſhall "be adjudged felons, and ſuffer death without benefit of "clergy."

43 Eliz. c. 13. *Burning on the Northern borders.*

By ſtat. 22 & 23 Car. 2. c. 7. ſ. 2. "Where any perſon or "perſons ſhall in the night-time maliciouſly, unlawfully, and "willingly burn, or cauſe to be burned or deſtroyed, any "*ricks* or *ſtacks* of corn, hay, or grain, barns, or other houſes "or buildings, or kilns of any perſon or perſons whatſoever; every ſuch offence ſhall be adjudged felony:" but by

22 & 23 Car. 2. c. 7. *Malicious burning in the night.*

Ch. XXI. § 2. *By ſtatute.*

by ſ. 3. "without corruption of blood," &c.: And by ſ. 4. "If any perſon who ſhall be convict or attainted of any "offence hereby made felony (to avoid judgment of death "or execution thereupon) ſhall make his election to be *tranſ-* "*ported*, &c. then the juſtices of aſſize, oyer and terminer, "gaol delivery, and of the peace, before whom ſuch offender "ſhall be convict or attaint by virtue of this act, reſpective- "ly, ſhall cauſe judgment to be entered againſt every ſuch "offender, that he be tranſported beyond the ſeas to ſome "of his majeſty's plantations in the ſaid judgment to be "particularly mentioned and expreſſed, there to remain for "ſeven years: And if any ſuch offender ſhall return into "this kingdom before the expiration of the ſaid ſeven years, "he ſhall ſuffer death as a felon, and as if no ſuch election "to be tranſported had been made by him." By ſ. 7. offenders under this act muſt be proceeded againſt within ſix months after the offence committed.

W. Haſſell's caſe, 2 Leach, 1—6.

It never was doubted but that burning *one rick*, &c. was within the ſtatute, though in the plural.

9 Geo. 1. c. 22. *(Black Act.) Burning at any time.* Made perpetual by ſtat. 31 G. 2. c. 42.

But the principal ſtatute is the 9 Geo. 1. c. 22. which enacts (ſ. 1.) that "if any perſon or perſons ſhall (*a*) ſet fire "to any houſe, barn, or outhouſe, or to any hovel, cock, "mow, or ſtack of corn, ſtraw, hay, or wood; or ſhall "forcibly reſcue any perſon being lawfully in cuſtody of any "officer or other perſon for any the offences before mention- "ed; or if any perſon or perſons ſhall by gift or promiſe of "money or other reward procure any of his majeſty's ſub- "jects to join him or them in any ſuch unlawful act; every "perſon ſo offending, being thereof lawfully convicted, ſhall "be adjudged guilty of felony, without benefit of clergy."

By ſ. 2. of the ſame act, offenders not ſurrendering on proclamation are alſo ouſted of clergy.

Judd's caſe, 2 T. Rep. 255.

Henry Judd was bailed by the court of King's Bench on a warrant of commitment for ſetting fire to a *parcel* of unthreſhed wheat, the fact as charged not being felony within this ſtatute.

9 Geo. 3. c. 29. ſ. 2. *Burning mills.*

By ſtat. 9 Geo. 3. c. 29. ſ. 2. "Whereas no effectual "proviſion hath heretofore been made for preventing the

(*a*) The words "*unlawfully and maliciouſly*," and "*wilfully and maliciouſly*" which reſpectively occur in the paragraphs deſcribing other offences before and after this in the ſame clauſe, are omitted in this paragraph. Sed *vide* poſt. ſ. 3.

" burning of mills, be it enacted, that if any perſon or per- Ch. XXI. § 2.
" ſons ſhall (after the 1ſt July 1769) wilfully or malicioufly *By ſtatute.*
" burn or ſet fire to any wind-ſaw-mill, or other wind-mill,
" or any water-mill, or other mill; ſuch perſon ſo offend-
" ing, being lawfully convicted thereof, ſhall be adjudged
" guilty of felony without benefit of clergy."

By ſ. 4. " No perſon ſhall be proſecuted by virtue of this *Limitation.*
" act for any offence committed contrary to the ſame, un-
" leſs ſuch proſecution be commenced within 18 months
" after the offence committed."

§ 3.

1. It muſt be a malicious and voluntary burning, other- *Malicious and voluntary.*
wiſe it is not felony, but only a treſpaſs; and therefore no 1 Hale, 567. 569.
negligence or miſchance amounts to it. As, if an unqualified 3 Inſt. 67.
perſon by ſhooting at game happen to ſet fire to the thatch Poſt. ſ. 11.
of a houſe; or even if a man were ſhooting at the poultry of another. In this caſe however it ſhould ſeem to be underſtood that he did not intend to ſteal the poultry, but merely to commit a treſpaſs; for otherwiſe the firſt intent being felonious, the party muſt abide all the conſequences.

If A. have a malicious intent to burn the houſe of B., and 1 Hale, 569.
in ſetting fire to it burn the houſe of C. as well as of B., or 3 Inſt. 67.
the houſe of B. eſcape by ſome accident, and the fire burn 1 Hawk. ch. 39. ſ. 5.
the houſe of C.; though A. did not intend to burn C.'s Plowd. 475.
houſe, yet in law it ſhall be ſaid to be a malicious and wilful *Vide* poſt, ſ. 8.
burning of the houſe of C. And ſo, ſays Plowden, If one command another to burn the houſe of J. S., and he do ſo, and the fire thereof burn another houſe, the commander is acceſſary to the burning ſuch other houſe.

And in this reſpect the ſtat. 9 Geo. 1. makes no differ- 2 MS. Sum. 327.
ence; for the offences there mentioned muſt be done *wilfully* 2 Blac. Rep. 843.
and maliciouſly, though not ſo expreſſed in the ſtatute; for 4 Blac. Com. 222.
the malice makes the crime. They are not neceſſary how- *Vide* Minton's caſe, poſt, 1021.
ever to be expreſſed in a declaration againſt the hundred for damages, as was holden by the court of C. B. in the caſe of Allan v. The Hundred of Kirton, though they thought it probable that the offence muſt be ſo charged in an indictment for the felony.

But by ſtat. 6 Ann. c. 31. any ſervant *negligently* ſetting 6 Ann. c. 31.
fire to a houſe or outhouſes, ſhall, on conviction before two *Negligent burning by ſervants.*
juſtices of the peace, forfeit 100l., or be ſent to the houſe of correction for 18 months.

2. To

Ch. XXI § 4. *What a burning.*

2. To conſtitute arſon at common law there muſt be an *actual burning* of the houſe, or of ſome part of it; though it be not neceſſary that any part be wholly conſumed, or that the fire ſhould have any continuance, but be put out or go out of itſelf. But merely putting fire into or towards a houſe, however maliciouſly, if either by accident or timely prevention the fire do not take, and no part be burned, does not amount to arſon at common law. The ſtat. 9 Geo. 1. c. 22. does indeed in enacting the felony make uſe of the words "*ſet fire to;*" but I am not aware of any deciſion which has put a larger conſtruction on thoſe words than prevails by the rule of the common law; and the contrary opinion may be collected from what was ſaid in Spalding's caſe, and Breeme's caſe, and in the following caſe of Sarah Taylor.

§ 4. *What a burning*
3 Inſt. 66.
1 Hale, 568.
Sum. 85.
1 Hawk. ch. 39. ſ 4.
2 MS. Sum. 3:9.
4 Blac. Com. 222.
R. v. Sarah Macing, O.B. 1761.

Poſt. ſ. 6.

Taylor's caſe, Rocheſter, 1760, cor. Legge B.
1 Leach, 58.

Sarah Taylor was indicted for ſetting fire to an outhouſe, commonly called a paper-mill. It appeared that ſhe had ſet fire to a large quantity of paper which was drying in a loft annexed and belonging to the mill; but no part of the mill itſelf was conſumed; and therefore the Judges thought the caſe not within the ſtatute on that ground; though another doubt was ſtarted whether a *mill* were an *outhouſe* within the meaning of the act.

§ 5. *The houſe.*
1 Hale, 567, 570.
Sum. 86.
3 Inſt. 67. 69.
1 Hawk. ch. 39. ſ. 1, 2.
4 Blac. Com. 221.

3. What is underſtood by *the houſe*. This extends at common law not only to the very *dwelling-houſe*, but to all *outhouſes* which are *parcel thereof*, though not adjoining thereto, nor under the ſame roof. And yet the indictment need not charge the burning to be of a *manſion-houſe*, but only of *a houſe*. What conſtitutes an outhouſe to be parcel of the dwelling-houſe was conſidered at large in treating of burglary,

Ante, 492.

to which I refer. But the burning of a barn, though no part of the manſion, if it have corn or hay in it, is felony at common law. And it has alſo been ſaid, that at common law arſon extended to the burning of a ſtack of corn: but ſince the paſſing of the ſeveral ſtatutes above referred to, it is become unneceſſary to diſcuſs this and other doubtful queſtions of the like nature.

Donnevan's caſe, Lancaſter, 1770, 2 Blac. Rep. 682. (1 Leach, 84.

Upon the conſtruction of the ſtat. 9 Geo. 1. c. 22. it has been holden that a common gaol is a houſe within the meaning

S. C.)

ing of it. The entrance to the priſon was through the dwelling-houſe of the gaoler, and the priſoners were ſometimes allowed to lie in it. All the Judges held that the dwelling houſe was to be conſidered as part of the priſon, and the whole priſon was the houſe of the corporation to whom it belonged. One ſet of the counts there laid it to be the houſe of the corporation, another of the gaoler, and a third of the perſon whom the gaoler ſuffered to live in the dwelling-houſe.

Ch. XXI. § 5. *The houſe.*

In Suſanna Minton's caſe, the indictment charged that ſhe felonioufly and maliciouſly, &c. in the night-time ſet fire to a barn of Paul Gwatkin, and burned the ſame. It was proved that there was hay and corn in the barn; but it was not ſo ſtated in the indictment, which was drawn on the ſtat. 22 & 23 Car. 2. c. 7. The jury found the priſoner guilty of ſetting fire to and burning the barn, but not in the night-time. It was objected that this verdict amounted to a complete acquittal, and that no judgment could be given againſt the priſoner; upon which the judgment was reſpited. In Eaſter term 1786, ten Judges preſent, all held that the priſoner was properly convicted; for though the indictment laid the offence to be done *in the night-time*, which would have been neceſſary to have brought the caſe within the ſtat. 22 & 23 Car. 2. yet that that fact was immaterial on the ſtat. 9 Geo. 1. which does away any ſuch diſtinction, and extends generally to all barns of other perſons, whether having hay or corn in them, or being empty; and whether burnt in the day or night-time. Note, It ſeemed to be the opinion of all, that ſuppoſing it to be neceſſary that there ſhould be hay or corn in the barn, it muſt have been ſo ſtated in the indictment. So, though the word *maliciouſly* be not in the ſtatute, Q. if it muſt not be ſtated in the indictment?

Minton's caſe, Hereford Spring Aſſ. 1786, cor. Buller J. MS. Gould and Buller Js. and MS. Jud. *Though an indictment for ſetting fire to a barn ſtate it to be in the night, yet that is not material to be proved under the ſtat. 9 G. 1. nor is it neceſſary that the indictment ſhould ſtate that there was corn or hay in the barn. But though the word* maliciouſly *be not in the ſtatute, Qu. if it muſt not be laid in the indictment?* (Ld. Mansfield C. J. and Nares J. abſent.)

2 MS. Sum. 327. MS. Buller J.

North was indicted for felonioufly, wilfully, and maliciouſly, againſt the form of the ſtat. (9 Geo. 1. c. 22.) ſetting fire to a certain outhouſe of John Taylor, ſituate at Knareſborough in the county of York. It appeared in evidence that the priſoner had ſet fire to and burnt part of a building of the proſecutor, which was ſituated in a yard of his at the back of his dwelling-houſe, which was in the ſtreet of the town of Knareſborough. The building was about four or five yards diſtant from the dwelling-houſe, but not joined

North's caſe, York Sum. Aſſ. 1795, MS. Jud. *Indictment for ſetting fire to an* outhouſe *is good and ſufficient to ouſt the offender of clergy under the ſtat. 9 G. 1. though it may in point of law form part of the dwelling-houſe, the burning of which is arſon at common law.*

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to it. The yard was incloſed on all ſides, in part by the dwelling-houſe, in another by a wall, in a third by a railing which ſeparated it from a field, and in the remaining part by a hedge. The proſecutor kept a public houſe, and alſo carried on the buſineſs of a flax-dreſſer. The buildings ſet fire to, and in part burnt, conſiſted of a ſtable, and a chamber over it, which was uſed by the proſecutor as a ſhop for keeping and dreſſing flax. It was objected on behalf of the priſoner, that this building was not an *outhouſe* within the ſtat. 9 Geo. 1. c. 22. as that muſt be underſtood to mean outhouſes which in contemplation of law were not part of the dwelling-houſe; which it was inſiſted this was, and that the indictment ſhould have been for arſon at common law. The jury found the priſoner guilty, and the point was reſerved for the opinion of the Judges. On the 6th of *November* 1795 (Hotham Baron abſent), all the Judges agreed that the verdict was right. It was obſerved, that though for ſome purpoſes this might be part of the dwelling-houſe; yet ſtill it was in fact an outhouſe. And 3 Inſt. 67. was referred to, where it is laid down, that to burn a ſtable and the like, parcel of the manſion-houſe, is felony; but that in the indictment it is ſufficient to ſay domum, viz. a barn, malt-houſe, or the like, without ſaying manſionalem. And in Breeme's caſe it was conſidered that the ſtat. 9 Geo. 1. c. 22. did not alter the nature of the crime, or create any new offence, but only excluded the principal from clergy more clearly than he was before; which till then was only by inference from the ſtat. 4 & 5 Ph. & M. which took it from the acceſſary before the fact.

Poſt.

§ 6. *The houſe of another.* Poſt. ſ. 11.

4. It remains to be conſidered what is *the houſe of another* within the definition above laid down; for the dwelling-houſe or other deſcription of property muſt be laid and proved to be in the poſſeſſion ſuo jure of ſome other than the priſoner himſelf at the time of the fact committed. This inquiry is the more neceſſary, becauſe in this particular it has been recently holden in Spalding's caſe, Breeme's caſe, and Pedley's caſe hereafter mentioned, that the ſtat. 9 Geo. 1. c. 22. and the other ſtatutes make no difference in the nature of the offence; they being all confined to a burning the property of another. Upon this head Holmes's caſe

caſe is the firſt and leading determination, founded as it ſhould ſeem upon the ancient definition of this offence. He was indicted, for that being poſſeſſed of a houſe in London under a leaſe for ſix years, remainder to another for three years, reverſion in fee to another, he vi et armis, feloniouſly, maliciouſly, &c. burned the ſaid houſe, with intent the ſame dwelling-houſe, and alſo divers other dwelling-houſes of divers liege ſubjects of the King then and there ſituate and being, contiguous and adjacent to the ſaid dwelling-houſe of the defendant, then and there feloniouſly, wilfully, and maliciouſly to burn and conſume with fire, againſt the peace, &c. Being convicted, and the record removed by certiorari into B. R. before judgment, it was holden by three Judges againſt Croke that it was not felony to burn a houſe whereof the party was in poſſeſſion under a leaſe for years; for it muſt be the houſe of another, which could not be ſaid in the caſe of a leſſee for years in poſſeſſion at the time of the burning. Wherefore, (as the report improperly ſtates,) the priſoner was diſcharged of the *felony:* but becauſe of the heinouſneſs of the offence he was ſeverely fined and impriſoned, ſet in the pillory, and bound for his future good behaviour for life. Upon the ſuppoſition that this was an indictment for felony, in which the priſoner had judgment as for a miſdemeanor, the judgment, as ſuch, is juſtly diſapproved of by Lord Hale; becauſe the priſoner was thereby deprived of thoſe advantages for his defence which he would otherwiſe have had: and it has been ſince condemned in Weſtbeer's caſe. But that is an inaccurate view of the caſe, the true account of which is to be found in Kelyng; by whom it is obſerved, that all the ſpecial matter being laid in the indictment, and the defendant found guilty of the charge as laid; it being in law no felony, he was conſequently found guilty of the treſpaſs and miſdemeanor, for which he had judgment; and Lord Mansfield explained it in the ſame manner in Scofield's caſe.

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R. v. Holmes, Cro. Car. 376. & W. Jones, 351. 4 Blac. Com. 221. 1 Hale, 568. *Vide* Bract. lib. 3. 146. b. Brit. 16. Flet. lib. 1. c. 35. Mirr. c. 1. § 8. 3 Inſt. 66.

2 Hale, 172. (Sed *vide* a ſatisfactory explanation in Scofield's caſe, Cald. 401. & Kel. 29.)

R. v. Weſtbeer, T. 13 & 14 G. 2. *Vi.* 2 Stra. 1137.

The principal point in Holmes's caſe has been alſo called in queſtion by Mr. Juſtice Foſter in the caſe of Elizabeth Harris. The priſoner, who was a girl of 14 years of age, but of ſufficient underſtanding for her age, was indicted for maliciouſly ſetting fire to and burning a dwelling-houſe in the poſſeſſion of Edward Stokes; and Ann Courſe, the mother

Harris's caſe, Aylesbury Lent Aſſizes, 1753, cor Denniſon J. Foſt. 113. *One entitled only to dower out of a*

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houſe, which was leaſed to another, may commit arſon of it; and ſo it ſeems if the legal reverſion had been in the priſoner.

ther of the priſoner by a former huſband, J. Harris, was indicted as an acceſſary before the fact. J. Harris died, ſeiſed of the equity of redemption of this and another houſe adjoining, ſubject to a mortgage term, which equity deſcended to his eldeſt ſon, who was left with other children under the care of their mother Anne. Anne was entitled to dower out of theſe houſes, but it was never aſſigned; and ſhe let them to Stokes, and received the rent. But having a large family, ſhe was obliged to aſk relief of the pariſh, which the overſeers refuſed, unleſs they were let into the receipt of the rent. On this ſhe made frequent declarations that ſhe would burn the houſes down, which was at length effected by means of her daughter *Elizabeth*, whom ſhe employed for that purpoſe. Both the priſoners being found guilty, their caſe was reſerved for the conſideration of the Judges, who unanimouſly agreed that it was felony in both. The only doubt was with regard to the intereſt which the priſoner Anne had in the houſe, which was grounded on the reaſoning in Holmes's caſe; for unleſs ſhe were guilty of felony, the charge againſt the priſoner Elizabeth, who acted by her directions, muſt alſo have failed. Of Holmes's caſe it was ſaid that he had the poſſeſſion by legal title, and during the continuance of his leaſe could maintain his poſſeſſion againſt all mankind; and therefore the houſe might in a limited ſenſe be called his own. But in the preſent caſe the poſſeſſion was in Stokes under a demiſe from Anne on behalf of her ſon; and her title to dower, had Stokes's intereſt been out of the caſe, did not ſo much as give her a right of entry, it being a bare right of action. It was alſo ſaid in the debate of this caſe by ſome of the Judges, and not denied by any, that had Anne been ſeized of the freehold and inheritance of the houſe, and Stokes in poſſeſſion under a leaſe, it would have been felony in Anne to have burned it. The principle that three of the Judges went upon in Holmes's caſe, adds Mr. Juſtice Forſter, ſeems to warrant this opinion: they conſidered the houſe as Holmes's *own houſe*, by reaſon of the eſtate he had in it under his leaſe. Croke J. did not diſpute the principle, though he argued againſt the concluſion the other Judges drew from it. And if this be ſo, Mr. Juſtice Foſter ſays, he does not ſee why it may not with ſtrict legal propriety be ſaid of a

4 Blac. Com. 221. S. P.

reverſioner,

reverſioner, who ſhould maliciouſly ſet fire to houſes in the poſſeſſion of his tenants under leaſes, that he ædes alienas combuſſit. In Holmes' caſe, he adds, the houſe might with ſtrict legal propriety have been conſidered as the houſe of the landlord: both landlord and tenant have a property, one temporary and limited, the other abſolute and perpetual. Both the priſoners were afterwards ſentenced to death, but Elizabeth, being young, and acting under her mother's direction, was reprieved and recommended to mercy on condition of tranſportation.

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Notwithſtanding, however, the weight juſtly annexed to the opinion of Mr. Juſtice Foſter, the point ruled in Holmes' caſe has ſince been determined to be law, and the precedent adopted in ſeveral late determinations.

William Spalding was indicted in the firſt count for feloniouſly, wilfully, and maliciouſly ſetting fire to and burning his own houſe at Harteſt, againſt the peace, &c. and in the ſecond count for feloniouſly, voluntarily, and maliciouſly ſetting fire to his own houſe, againſt the form of the ſtatute. The priſoner's houſe, which had been previouſly inſured by him, was in the village of Harteſt in Suffolk, not adjoining to, but within two or three yards of other houſes on each ſide; and in conſequence of his ſetting fire to it, of which there was no doubt, ſome part of the timber and thatch was burned. It appeared that the priſoner had before inſured the houſe and goods for 100 l. and that in 1776 he had ſurrendered the premiſes, being copyhold, to the uſe of one Nott, to ſecure 60 l. lent thereupon; but Nott was never admitted. The priſoner being convicted of the fact, Buller J. reſpited the judgment, and ſubmitted to the Judges, 1ſt, Whether the indictment were properly adapted to the caſe; 2dly, Whether evidence reſpecting the inſurance and the mortgage ought to have been received; 3dly, Whether the offence proved amounted to arſon. Upon the firſt queſtion all the Judges (abſent De Grey C. J. and one place being vacant) were of opinion that the indictment was bad: for that arſon at common law was the burning of the houſe of another, according to the reſolution in Holmes' caſe, which muſt govern: and that the ſtat. 9 Geo. 1. c. 22. did not create a new offence, but only excluded the principal from clergy more clearly in reſpect of what was arſon at common law: it being doubtful before that ſtatute, whether

Spalding's caſe, Bury Spr. Aſſ. 1780, cor. Buller J. MS. Buller J. and Gould J. (1 Leach, 258. S. C.) *Mortgagor in poſſeſſion burning his own houſe, no arſon either at common law or by ſtat.* 9 Geo. 1. c. 22.

12th April 1780.

Vide 4 Blac. Com. 222, 3. 330. to 336.

and Alexander Poulter's caſe, 11 Co. 29. Foſt.

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ther or not the principal, or at leaſt perſons in holy orders, were entitled to the benefit of clergy in arſon.

Breeme's caſe, O. B April 1780, cor. Eyre B. MS. Buller J. (1 Leach. 261. S. C.) and 2 MS. Sum. 319. *No arſon by leſſee to burn the houſe in the poſſeſſion under the leaſe.*

Andrew Breeme was indicted for arſon of a houſe at common law, and upon the ſtatute 9 G. 1.; and the indictment, which contained ſeveral counts, reſpectively charged it to be the houſe of William Bolton, of Stone Tuppen, and of the priſoner himſelf. The jury found him guilty, and alſo found that the priſoner wilfully and maliciouſly ſet on fire and burnt the houſe mentioned in the indictment, which was in leaſe to him from Stone Tuppen for the term of three years, who was poſſeſſed of it for a term of 99 years under Bolton. On the 26th of May 1780, the Judges (Lord Mansfield and De Grey C. Js. abſent, and one place vacant,) debated this caſe, and all but Nares J., who the next day alſo concurred, held that the priſoner was not guilty of felony. They ſaid, as in Spalding's caſe, that arſon is the burning the houſe *of another:* that it is an offence immediately againſt *the poſſeſſion:* and that therefore, if a perſon in poſſeſſion of a houſe as tenant, however ſhort his term may be, ſet fire to it, it is not arſon. They all thought that Holmes' caſe could not be departed from, though ſome thought that poſſibly it might have been otherwiſe determined at firſt. Others, however, held the principle of that caſe to be right, conſidering the offence to be created for the protection of the party in poſſeſſion. And all the Judges again held that the ſtat. 9 Geo. 1. did not vary the offence, but was paſſed to exclude clergy from the principal more clearly than it was before; and particularly adverted to a clauſe at the end of that act for ſecuring damages to the party injured.

MS. Gould J

Rex v. Pedley, B. R. Trin. 22 Geo 3. MS. (Cald. 218. and 1 Leach, 277. S. C.) *Vide* 1 Hale, 568.

Theſe caſes were again recognized in that of Pedley, who, in one amongſt other counts of the indictment, was charged with burning his own houſe. Though Ld. Mansfield ſaid that if Holmes' caſe had been a new queſtion he ſhould not have been ſingly of a contrary opinion. Pedley was alſo charged with ſetting fire to his own houſe, with intent to burn the houſe of Richard Coombe, and (in another count) of the mayor of Briſtol, near to the priſoner's own houſe, by which the ſaid houſe of R. Coombe, &c. was ſet on fire and burned. The ſpecial verdict ſtated that the houſe had been demiſed by the mayor of Briſtol to Coombe for 99 years, by him to one Parry for a year, and ſo from year to year, and by Parry

to

to one John Landry for three months, who was in poſſeſſion of it at the time of its being burned. And there being no count ſtating it to be the houſe of John Landry, the Court, who held that arſon was an offence againſt *the poſſeſſion of another*, gave judgment for the priſoner; but remanded him to cuſtody, as he had not been tried for burning the houſe of the tenant.

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But it is not a mere reſidence in a houſe without any intereſt therein which will bring a party within the principle of the above caſes. In William Gowen's caſe, it appeared that the houſe which had been burnt by him at Laxfield in Suffolk was rented by one Richard Dobney, named in the firſt count as the owner, and let by him from year to year to the pariſh officers of Laxfield, who paid the rent for it, and who were at the time of the burning the houſe the perſons named (individually) in the third count of the indictment, which was framed as well at common law as on the ſtat. 9 Geo. 1. The priſoner was a poor man maintained by the pariſh, and had ſome time before the burning of the houſe been put by the pariſh officers to live there, and was reſident therein with his family at the time of the fact being committed, and had the ſole poſſeſſion and occupation of it, without payment of any rent. The priſoner was found guilty; and on reference to the Judges in Michaelmas term 1786, they all held the conviction to be proper; for the priſoner had no intereſt in the houſe, but was merely a ſervant, and therefore it could not be ſaid to be *his* houſe; but the overſeers had the poſſeſſion of it by means of his occupation.

Gowen's caſe, Bury Sum Aſſ. 1786, cor. Lord C. B. Skinner. MS. Buller J. and MS. Jud.

One put by overſeers of the poor into a houſe to live there is merely a ſervant, and his poſſeſſion is theirs, and he may commit arſon by burning it.

Vide Rickman's caſe, poſt, t. 11. S. P.

Other nice queſtions have occurred in caſes where the poſſeſſion has been ambiguous, as againſt whoſe houſe the indictment ſhould charge the offence to have been committed; but theſe will more properly come under conſideration when I treat of the form of the indictment, and the proof neceſſary to ſupport it.

Poſt. t. 11.

§ 7.

Burning a man's own houſe.

But though arſon can only be committed by burning the houſe of another, yet even the burning of a man's own houſe in a town, or ſo near to other houſes as to create danger to them, is a great miſdemeanor, and may be puniſhed with fine and impriſonment, pillory and finding

1 Hawk. ch. 39. ſ. 1.
1 Hale, 568, 9.
Holmes' caſe, Cro Car. 377. Sum 85.
4 Blac. Com. 221.

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ſureties, as was done in Holmes' caſe before mentioned. In ſome caſes the indictment has laid the fact to be with intent to burn ſuch other houſes: but however ſuch an intent may aggravate the offence, it is clearly not neceſſary to be laid or proved: ſuch an act muſt in its nature create great danger and terror to the neighbourhood, be the intent what it may. And in Proberts' caſe, after mentioned, no other matter was laid in aggravation but the contiguity of other houſes, which were thereby endangered.

Poſt. 1030.

It is alſo a great aggravation if one burn his own houſe in any ſituation with intent to defraud inſurers: but I find no inſtance of an indictment ſuſtained on that ground alone as the giſt of the offence: it was otherwiſe laid in the caſes of *Proberts* and *Iſaac* after-mentioned.

Scofield's caſe, Hil. 24 Geo. 3. B. R. Cald. 397.

Arſon is an injury only to the actual poſſeſſion, and muſt be ſo laid.

Where an indictment charges an act to have been done with a felonious intent, and the jury find a verdict of guilty; if the charge, as laid, do not amount to felony, but amounts in law to a miſdemeanor, the Court will pronounce judgment as for that offence.

John Scofield was tried before Lord Mansfield, at the ſittings at Weſtminſter after Michaelmas term, 24 Geo. 3. on an indictment which contained ſix counts. The firſt count ſtated that the priſoner wickedly, unlawfully, and maliciouſly intending and contriving to feloniouſly ſet fire to, burn, and conſume a certain houſe of one James Ramſey there ſituate, (of which houſe he the priſoner was *then poſſeſſed*, for a certain term of years then and yet to come and unexpired,) on, &c. with force and arms, at, &c. a certain lighted wax candle, which he the ſaid priſoner had then lately before ſet fire to and lighted, did unlawfully, wickedly, and maliciouſly ſix and put in a certain cloſet under and adjoining certain wooden ſtairs called the kitchen ſtairs, in the aforeſaid houſe of the ſaid James Ramſey; which ſaid houſe was then ſituate in a certain neighbourhood and ſtreet there called New Bond-ſtreet, and contiguous and adjoining to certain dwelling-houſes thereof, and belonging to divers liege ſubjects, &c.: and that he the priſoner did then and there unlawfully, wickedly, and maliciouſly put and place about, unto, and againſt the ſaid lighted candle, ſo fixed and put by him in the ſaid cloſet as aforeſaid, divers matches, &c. and other combuſtible materials, *with a wicked and malicious intention, by means thereof then and there feloniouſly to ſet fire to the aforeſaid houſe of the ſaid James Ramſey, and to burn and conſume the ſame*, to the great damage, &c. The ſecond count no otherwiſe varied the charge than by deſcribing the houſe to be the dwelling-houſe of the priſoner himſelf. The third count ſtated that the

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the priſoner ſet fire to certain matches, &c. in a certain other houſe of the ſaid James Ramſey, &c. under certain wooden ſtairs, &c. by means thereof felonioufly to ſet fire to the ſaid *laſt-mentioned houſe*, &c.: without ſtating, that it was in the poſſeſſion of the priſoner, or that he had any term in it. The fourth count charged the offence to have been committed in the ſame manner, in the houſe of the priſoner. The fifth count charged an attempt to ſet fire to the houſe of the ſaid James Ramſay; and the ſixth count, an attempt to ſet fire to the houſe of the priſoner. All the counts in like manner charged the act to have been done with a wicked and malicious intention *felonioufly* to ſet fire to the houſe, &c. but none of them charged an intent of ſetting fire to the adjoining houſes. The jury having found the priſoner guilty; it was afterwards moved to arreſt thejudgment; 1ſt, becauſe the indictment having charged the offence to have been done felonioufly, it could only be ſuſtained by ſhewing it to be a felony. 2dly, That if it were no felony the fact was not indictable at all, as it was merely an attempt to commit a miſdemeanor. After argument, the Court took time to conſider their judgment; and on the 11th of Feb. 1784;

Lord Mansfield C. J. delivered their opinion. He began by obſerving that the third count was clear of all objection: for there it was ſtated to be the houſe of J. Ramſay, without alleging that it was in the priſoner's poſſeſſion; and as it would have been felony to have burnt ſuch a houſe, the intent was there properly charged to be felonious. But as the evidence did not ſupport that count, the judgment of the Court was founded on the firſt count. Then as to the firſt objection urged againſt the firſt count; it was certainly true that it could be no *felony* in the defendant to burn *a houſe of which he was in poſſeſſion;* and that fact appearing upon the face of the indictment, by which the Court muſt ſee that the offence charged was not a felony, the word *felonioufly* was repugnant to the legal import of the offence charged, and muſt be rejected as ſurpluſage; and then judgment ought to be pronounced againſt the defendant as for the offence of which he ſtood convicted; according to the precedent in Holmes' caſe, which was an authority expreſsly in point, and when examined and rightly underſtood was not liable to the objection made to it by Lord Hale. [He then explained the true ground of that judgment in the manner before

ante, 1023.

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before ſtated]. In anſwer to the ſecond objection, he obſerved that the offence did not reſt in bare intention, which without an act done was not puniſhable by our law; but here was an act done, and then the law might judge not only of the act itſelf, but of the intent with which it was done; and that if the act were coupled with an unlawful and malicious intent, though in itſelf the act would otherwiſe have been innocent, the intent being criminal, the act became criminal and puniſhable. And that there was no difference in the deſcription of the offence, though there was in the degree of guilt, whether the act were done with intent to commit a felony, or with intent to commit only a miſdemeanor. And he referred to ſeveral authorities as ſupporting the general principle.

Proberts' caſe, B. R. Mich. 40 G. 3. MS. *Burning a man's own houſe contiguous to others, indictable as a miſdemeanor at common law. If done with intent to defraud inſurers, and other houſes be burned in conſequence, the latter is felony.*

The ſame doctrine was laid down in the caſe of William Proberts. He was indicted for a miſdemeanor in having unlawfully, wilfully, and maliciouſly ſet on fire and burnt a certain houſe of William Bramwell, ſituate in the pariſh of St. Ann within the liberty of Weſtminſter, then in the occupation of the defendant, which ſaid houſe was contiguous and adjoining to certain dwelling-houſes belonging to divers liege ſubjects ſituate in the ſaid pariſh, by means whereof the dwelling-houſes of divers liege ſubjects were in great danger of being burned; to the damage terror and affrightment of all liege ſubjects near the ſaid houſe of the ſaid William Bramwell inhabiting and dwelling, to the great damage of the ſaid W. Bramwell, and againſt the peace, &c. The ſecond count laid it to be the defendant's own houſe. The defendant was tried and found guilty at the ſittings in Trinity term 1799 before Ld. Kenyon C. J.; and being brought up for judgment in Michaelmas term following was ſentenced by the Court to two years impriſonment in Newgate, and during that time to ſtand once in the pillory at Charing-Croſs, and to give ſecurity for his good behaviour for ſeven years from the expiration of his impriſonment, himſelf in 500l., and two ſureties in 50l. each. In paſſing ſentence Groſe J. ſaid, that though by a lenient conſtruction of the law of arſon this offence was holden not to be felony, yet it was a miſdemeanor of great magnitude, and deſerving of the moſt exemplary puniſhment. And that if it had ſo happened that any of the neighbouring houſes had been ſet

on fire in conſequence of the defendant's wilful and malicious act in ſetting fire to his own houſe, (which was proved to be done in order to cheat the inſurance office,) it would clearly have amounted to a capital felony, and his life would have paid the forfeit.

Ch. XXI. § 7. *Of a man's own houſe.*

Hence it appears that though the primary intention of the party were only to burn his own houſe, yet if in fact others were burnt, being adjoining and in ſuch a ſituation as that the fire muſt in all probability reach them, the intent being unlawful and malicious, and the conſequence immediately and neceſſarily flowing from the original act done, it is felony. This has been before adverted to with another view, to ſhew that the malice ſhall be applied to the conſequential act, and is alſo confirmed by an expreſs deciſion on the point.

§ 8. *Intent to burn a man's own houſe, and thereby burning another's.* *Vide* ante, f. 3. and 6 St. Tr. 222.

John Iſaac was indicted for a miſdemeanor in having unlawfully, wilfully, and maliciouſly ſet on fire and burnt a certain houſe of Thomas Iſaac, being in the occupation of the ſaid John Iſaac: which houſe the indictment alleged was contiguous and adjoining to certain dwelling-houſes of divers liege ſubjects, &c.; by means whereof the ſame were in great danger of being ſet on fire and burnt. There was a ſecond count which differed only in charging that the houſe ſet on fire was the priſoner's own houſe.

Iſaac's caſe, Spr. Aſſ. 1799. cor. Buller J. MS.

The counſel for the proſecution opened that the charge to be proved againſt the defendant, though laid as a miſdemeanor, was, that he wilfully ſet on fire his own houſe in order to defraud the Phœnix fire-inſurance office; and that in fact his own and ſeveral *other perſons' houſes* adjoining were *burnt* down. Upon which Buller J. ſaid, that if other perſons' houſes were in fact burnt, although the defendant might only have ſet fire to his own, yet under theſe circumſtances the priſoner was guilty, if at all, of felony; the miſdemeanor being merged; and he could not be convicted on this indictment; and therefore directed an acquittal.

4 Blac. Com. 221.

Principal and Acceſſary, and Clergy.

§ 9. *Principals and acceſſaries, or clergy.* 2 Hawk. ch. 33. ſ. 43. 1 Hale, 570. &c. 2 Hale, 333 & ch. 46. Fo. 192. 331. &c.

Whatever doubt may formerly have been entertained, whether the ſtats. 23 H. 8. c. 1. ſ. 3. and 25 H. 8. c. 3. ſ. 2, cutting clergy from the principals in arſon, which had been repealed by 1 Ed. 6. c. 12. ſ. 10., were revived in toto by ſtat. 5 & 6 Ed. 6. c. 10.; or whether the principals in arſon were

Ch. XXI. § 9. *Principals and acceſſaries.*

were virtually excluded by the ſtat. 4 & 5 Ph. & M., which excluded the acceſſary before, it is unneceſſary to conſider; becauſe clergy is now expreſsly denied to the principal in all caſes within the ſtat. 9 Geo. 1. c. 22. But Lord Hale and Mr. Juſtice Foſter are decidedly of opinion that the ſtat. 4 & 5 Ph. & M. had ſuch an operation.

4 Blac. Com 222. 11 Rep. 34. Plowd. 475. Ante, ſ. 2.

Vide Proceſs to bring in the party.

By the further proviſion of the ſtat. 9 Geo. 1. c. 22. the offender may be required by order of the King in council to ſurrender within 40 days in the manner ſet forth at large in another place, in default of which the Court may award execution.

In addition to the above, the general ſtat. of the 3 W. & M. c. 9. ſ. 2. enacts that "If any perſon or perſons whatſoever be "indicted of any offence, for which by virtue of any former "ſtatute he or they are excluded from the benefit of clergy "if he or they had been thereof convicted by verdict or "confeſſion; if he or they ſtand mute, or will not anſwer "directly to the felony, or ſhall challenge peremptorily "above 20, &c., or ſhall be outlawed thereupon, ſhall not "be admitted to the benefit of his or their clergy."

1 Hale, 573.

Acceſſaries after ſtand upon the ſame footing as in other felonies, and are not deprived of clergy by any ſtatute, except after an order of the King in council, as abovementioned, in which caſe after the time limited in the order is expired, "ſuch as conceal, aid, abet, or ſuccour ſuch "offender, knowing him to have been ſo charged and ſo "required to ſurrender, being lawfully convicted thereof, "are ouſted of clergy."

Trial.

§ 10. *Trial* 9 Geo. 1. c. 22

By the 14th ſect. of the ſtat. 9 Geo. 1. c. 22. "For the "better and more impartial trial of any indictment or in-"formation which ſhall be found, commenced, or proſecuted "for any of the offences againſt this act," it is enacted, "That every offence which ſhall be done or committed "contrary to this act ſhall and may be inquired of, exa-"mined, tried, and determined in any county within that "part of Great Britain called England, in ſuch manner and "form as if the fact had been therein committed." Saving corruption of blood, loſs of dower, and forfeiture of lands, goods and chattels.

In

In M rtis's caſe it was holden to be at the option of any private proſecutor to proſecute in another county. Ch. XXI. § 10. *Trial.*

Mortis's caſe, 2 Blac. Rep. 733.

Indictment and Proof.

§ 11. *Indictment and proof.*

The indictment for arſon at common law muſt lay the offence to have been done *wilfully* (or *voluntarily*) *and maliciouſly*, as well as *feloniouſly*. And in Cox's caſe, where the indictment which was for perjury at common law, charged the offence to have been committed "falſely, maliciouſly, wickedly, and corruptly," all the Judges held that thoſe words implied that it was done wilfully. And though the ſtat. 9 Geo. 1. has not the words "wilful and malicious," &c., yet it ſeems they are equally neceſſary to an indictment under the ſtatute; for malice is of the eſſence of the offence: and ſo it was conſidered by ſeveral of the Judges in Suſan Minton's caſe; though that point was not neceſſarily under conſideration.

1 Hawk. ch. 39. ſ. 5. 2 MS. Sum. 319. 327. Ante, ſ. 3. Rickman's caſe, poſt. 1034. Cox's caſe, 1 Leach, 82. S. Minton's caſe, ante, 1021. MS. Buller J.

It is agreed however, that laying the burning to be of *a houſe* is ſufficient even at common law, without ſaying a *dwelling*-houſe. In Glandfield's caſe after mentioned, the indictment, which was framed on the ſtat. 9 Geo. 1., ſtated the burning to be of *outhouſes* generally, which was ruled by Heath J. to be ſufficient, without ſtating of what denomination of outhouſes, ſuch being the deſcription in the ſtatute 9 Geo. 1.

1 Hale, 567. Sum. 86. 1 Hawk. ch. 39. ſ. 1. 3 Inſt. 67. poſt. 1034.

So it is ſufficient to charge the burning of an *outhouſe*, if it be ſuch in fact, though in point of law it be parcel of the dwelling-houſe, as being within the curtilage.

North's caſe, ante, 1021.

At common law it was neceſſary, as before obſerved, to ſtate an actual burning; but the ſtat. 9 Geo. 1. uſing the term "*ſet fire to*" the houſe, it is now become common to ſtate both, though in effect meaning the ſame thing.

Ante, ſ. 4.

Where, in order to convict a party of a miſdemeanor for burning his own houſe, it is neceſſary that the act ſhould be founded upon ſome ſpecial evil intent to the property of others, it is neceſſary to lay ſuch intent in the indictment. But whether or not ſuch intent be a neceſſary conſtituent part of the offence, if it be laid and proved, it is a circumſtance highly aggravating againſt the offender.

Ante, ſ. 7.

But

Ch. XIX. § 19. *Indictment and proof.*

But where one intending only to burn the houſe of A. thereby burns the houſe of B., the indictment may charge him with the malicious and wilful burning of B.'s houſe.

1 Hale, 569.

Whoſe houſe. Ante, f. 6. per tot.

From what has been ſaid before it is plain that an indictment for arſon muſt upon the face of it appear to be of the houſe *of another;* and it muſt alſo ſtate whoſe houſe; and with that the proof muſt agree. An indictment charged that the priſoners, Martha Rickman, and Sarah Rickman,

Rickman's caſe, Winchester Sum. Aſſ. 1789, cor. Buller J. MS. Buller J. and MS. Jud.

"feloniouſly, voluntarily, and maliciouſly ſet fire to *a certain houſe ſituate in the pariſh of Ellingham*, &c.; and by ſuch firing as aforeſaid feloniouſly, voluntarily, and maliciouſly burnt and conſumed the ſame houſe, &c." againſt the form of the ſtatute, &c. The priſoners were convicted; but judgment was reſpited. And afterwards, in Michaelmas term 1789, all the Judges held the conviction wrong, becauſe the indictment did not ſtate to whom the houſe belonged. And it having been proved in that caſe that the houſe belonged to the pariſh, and that they ſuffered one Thomas Early to live in it; but who were the truſtees, or in whom the legal eſtate was veſted, was wholly unknown; the Judges agreed that the houſe might have been laid to be the property of the overſeers, or of perſons unknown.

Ante, 1027.

It could not be ſaid to be Early's houſe, on the ſame principle as in Gowen's caſe beforementioned: he was merely a ſervant of the pariſh.

It requires great nicety in ſome caſes to diſtinguiſh the perſon, who may be ſaid to occupy ſuo jure, and againſt whom the offence muſt be laid to have been committed.

Glandfield's caſe, Exeter Spr. Aſſ. 1791, cor. Heath J. MS.

In Glandfield's caſe it appeared that the outhouſes burned were the property of Blanche Silk, widow, but were only made uſe of by John Silk her ſon, who lived with her after his father's death in the dwelling-houſe adjoining the outhouſes, and took upon him the ſole management of the farm, with which theſe outhouſes were uſed, to the loſs and profit of which he alone ſtood, though without any particular agreement between him and his mother; and he paid all the ſervants, and purchaſed all the ſtock: but the legal property both in the dwelling-houſe and farm was in the mother, and ſhe alone repaired the dwelling-houſe and the outhouſes in queſtion. Heath J. held, that as to the ſtable, pound,

pound, and hogſties which the ſon alone uſed, the indictment muſt lay them to be in his occupation; and as to the brewhouſe, (another of the outhouſes burned,) the mother and ſon both occaſionally paying for ingredients, the beer being uſed in the family, to the expences of which the mother in part contributed, though without any particular agreement as to the proportion, that the ſame ſhould be laid in their joint occupation. The priſoner was afterwards convicted on a ſecond indictment (*a*) drawn agreeably to this opinion; the firſt having improperly laid the whole premiſes as in the ſole occupation of the mother; and he was executed.

Ch. XXI. § 11. *Indictment and proof.*

In Minton's caſe before ſtated, though the indictment, which was framed on the ſtat. 22 & 23 Car. 2. c. 17. charged the burning to have been *in the night-time*, and the fact was proved to have been committed by day, yet the conviction was holden proper; that circumſtance being immaterial on the ſtat. 9 G. 1. c. 22.

Minton's caſe, ante, 1021.

In the caſe of the two Rickmans above mentioned, the proof adduced by the firſt witneſs of the priſoners' having been preſent in the houſe and implicated in the fact was, that a bed and blankets were afterwards found in their poſſeſſion, which had been taken out of the houſe at the time it was fired, and concealed by them from that time. Buller J. doubted at firſt whether ſuch evidence of another felony could be admitted in ſupport of this charge: but as it ſeemed to be all one act, although the priſoners came twice to the houſe fired, which was adjoining to their own, he admitted this amongſt other evidence.

Rickman's caſe, ante, 1034.

(*a*) The ſecond indictment contained two counts, the firſt laying the occupation in the ſon alone, the other laying it in the mother and ſon.

CHAP. XXII.

MALICIOUS OR FRAUDULENT MISCHIEF.

References to Offences *ejuſdem generis* under other appropriate Titles. § 1.

Arſon. Burning of all *Buildings, Stacks, &c. of Corn, Straw, Hay,* or *Wood. ib.*

Pulling down or beginning to demoliſh Houſes, Mills, and Chapels by Rioters, referable to *Riot. ib.*

Nuſances, Maims, Spoiling Cloaths, Piracy, referable to other general Heads.

1. *In the Northern Counties.* - § 2.

Making Prey or Spoil of Perſons or Goods on deadly Feud or otherwiſe, or taking or giving *Blackmail,* or *burning* Barns or Stacks of Corn, Felony without Clergy by Stat. 43 Eliz. c. 13. *ib.*

Moſs Troopers puniſhable capitally or by Tranſportation, by Stat. 18 Car. 2. c. 3. *ib.*

2. *By burning Grig, Ling, Heath, Furze, Goſs, or Fern.* - - - § 3.

A Miſdemeanor, by Stat. 4 & 5 W. & M. c. 23. and in Part inquirable before Juſtices of Peace by Stat. 28 Geo. 2. c. 9. paſſed for the better Preſervation of the Game. *ib.*

3. *By Hunters.* - - - § 4.

Offences by ſuch referable in Part to Larceny. *ib.*

Killing, wounding, or deſtroying, &c., or attempting to kill, &c. Deer in incloſed Grounds, Felony and Tranſportation by Stat. 42 Geo. 3. c. 107. *ib.*

The

The ſame in *open Ground*, a Forfeiture of 50l. &c. for firſt Offence, and for ſecond Offence Felony and Tranſportation for 7 Years. - - - § 4.

Carrying offenſive Weapon where Deer kept, with Intent to hunt, &c., or *reſiſting Keepers*, &c. Felony and Tranſportation. *ib.*

4. *By burning Timber-Trees, Woods, Underwoods, Coppices, &c. Roots, Plants, &c.* § 5.

The Statutes.

i. Barking *Fruit-Trees*, treble Damages to Party grieved, and Fine to the King, by Stat. 37 H. 8. c. 6. *ib.*

Damages recoverable againſt the Pariſh, &c. for the Deſtruction of *Trees* by Stat. 1 Geo. 1. ſt. 2. c. 48., the ſame as by Stat. 13 Ed. 1. ſt. 1. c. 46. for Hedges, &c. overthrown *in the Night*. *ib.*

ii. Malicious burning any *Wood, Underwood, or Coppice*, Felony by Stat. 1 Geo. 1. ſt. 2. c. 48. ſ. 4. *ib.*

Damages recoverable as by Stat. 1 Geo. 1. ſt. 2. c. 48. for the Deſtruction or ſpoiling of all Woods or Underwoods, Coppices, Trees, Poles, Springs of Wood, Thorns, and Quickſets, and for breaking down and deſtroying, &c. of all Gates, Pails, Rails, Fences, Ditches, Banks, &c. or other Incloſures of ſuch Woods, &c. whether by Day or Night, by Stat. 6 Geo. 1. c. 16. explaining and amending the former Act. *ib.*

iii. By ſ. 2. of Stat. 6 G. 1. c. 16. deſtroying, burning, ſpoiling, &c. in open or clandeſtine Manner, or wrongfully and maliciouſly, all ſuch *Woods, Springs of Wood, Underwood or Coppice*, or deſtroying, &c. *Hedges, &c.* or *Incloſures of ſuch Woods, &c. Plantations, Timber, Fruit-Tree or other Trees, Thorns*, or *Quickſets*, inquirable before Juſtices of Peace in or out of Seſſions, who on Conviction may award the ſame Penalties and Puniſhments as under Stat. 1 Geo. 1. ſt. 2. c. 48. *ib.*

Damages given to Party grieved by former Statutes extended to Trees in New Incloſures by Stat. 29 Geo. 2. c. 36. - - - - §5.

iv. Stat. 29 Geo. 2. c. 36. gives the like Juriſdiction to Juſtices of Peace to inquire of the ſame *Treſpaſſes* againſt New Incloſures as before given by Stat. 6 Geo. 1. c. 16. *ib.*

Obſervations on the abovementioned Statutes. - §6.

v. The unlawful and *malicious* Deſtruction of *ornamental, uſeful, or profitable Trees*, in any *Avenue, Garden, Orchard, or Plantation*, a capital Felony by Stat. 9 Geo. 1. c. 22. ſ. 1. - - - - §7.

Trial in any County. *ib.*

vi. The deſtroying or ſpoiling *in the Night* of *Timber-Trees, or Trees likely to become ſuch*, in open or incloſed Grounds, made a ſimple Felony and Subject to Tranſportation by Stat. 6 Geo. 3. c. 36. *ib.*

Extended to *Roots, Shrubs, or Plants* of 5s. Value in Garden Grounds, &c. *ib.*

Includes *Aiders* and *Abettors*. *ib.*

The Owner of the Trees muſt be named in the Indictment. *ib.*

vii. Spoiling or deſtroying *Timber-Trees or Trees likely to become ſuch*, 1ſt Offence a Penalty; 2d Offence Felony and Tranſportation by Stat. 6 Geo. 3. c. 48. *ib.*

Plucking up, ſpoiling, or deſtroying *Roots, Shrubs, or Plants* in cultivated Lands; 1ſt and 2d Offence a Penalty; 3d Offence Felony and Tranſportation. *ib.*

Cutting, ſplitting, ſpoiling, damaging, or deſtroying, &c. any Kind of *Wood, Underwood, Poles, Sticks of Wood, Green Stubs*, &c. or having the ſame in Cuſtody without good Account, for 1ſt and 2d Offence Penalties; for 3d Offence to be deemed an incorrigible Rogue. *ib.*

General View of the ſeveral Statutes. - - §8.

viii. By Stat. 37 H. 8. c. 6. burning *Heaps of Wood* prepared for making *Coals, Billets*, &c. treble Damages and Fine. - - - - §9.

5. *By*

5. *By malicioufly burning Wains and Carts laden with Goods.* - - § 10.

Puniſhable by the laſt-mentioned Statute in like Manner.

6. *By deſtroying or damaging Fences and Incloſures.* - - - § 11.

Damages to be recovered againſt adjoining Towns for Hedges and Dikes overthrown, by 13 Ed. 1. ſt. 1. c. 46. *ib.*

Indictable Offence. *ib.*

Setting Fire to, deſtroying, or damaging *Incloſures* under any Act of Parliament, Felony and Tranſportation by Stat. 9 Geo. 3. c. 28. *ib.*

Pulling down, or deſtroying *Pales*, &c. of Grounds where *Deer* kept, Penalty or Impriſonment, &c. by Stat. 16 Geo. 3. c. 30. ſ. 8. and other Statutes. *ib.*

7. *In reſpect of Fiſh-Ponds.* - § 12.

Breaking down the *Head or Mound of any Fiſh-Pond*, whereby the Fiſh be loſt or deſtroyed, *from Malice to Owner*, a capital Felony by Stat. 9 Geo. 1. c. 22. *ib.*

Trial in any County. *ib.*

Similar Offence, or cutting Heads or Pipes of Conduits, puniſhable as Miſdemeanor by Stat. 37 H. 8. c. 6. *ib.*

By Stat. 5 Eliz. c. 21. breaking, &c. Heads or Dams of Ponds, &c. *to ſteal Fiſh*, Impriſonment and treble Damages. But if done with Intent only to *ſteal* the Fiſh, not within the Stat. 9 Geo. 1. *ib.*

8. *In reſpect of Hops.* - - § 13.

Maliciouſly cutting *Hop-binds* growing on Poles in Plantations, a capital Felony, by Stat. 6 Geo. 2. c. 37. ſ. 6. *ib.*

General Proviſions of the Black Act extended to it by Stat. 10 Geo. 2. c. 32. *ib.*

9. *In*

9. *In obſtructing the free Paſſage of Grain; or deſtroying Places where Grain is kept.* § 14.

Uſing Violence to any—or breaking or cutting Carriage or Harneſs of Horſes conveying it—or injuring Horſes—or cutting Sacks—or ſcattering ſuch Grain; —Impriſonment on ſummary Conviction for firſt Offence, and Felony for ſecond, by Stat. 36 Geo. 3. c. 9. and 11 Geo. 2. c. 22. *ib.*

Alſo Felony and Tranſportation to deſtroy *Granary* or other *Place where Grain kept*, or carrying away or ſcattering or ſpoiling *Grain*, *Flour*, *Meal*, *or Malt*. *ib.*

Returning from Tranſportation before the Term, ouſted of Clergy. *ib.*

10. *To Cattle.* - - § 15.

Cutting out Tongue of tame Beaſt alive puniſhable by treble Damages and Fine, by Stat. 37 H. 8. c. 6. *ib.*

By Stat. 22 & 23 Car. 2. c. 7. killing *Horſes*, *Sheep*, *or other Cattle*, Felony and Death, but tranſmutable for Tranſportation. *ib.*

If Cattle not killed, puniſhable by treble Damages. *ib.*

But by Stat. 9 Geo. 1. c. 22. the *maliciouſly killing*, *maiming*, or *wounding any Cattle*, Felony ouſted of Clergy. *ib.*

Extends to Aiders and Abettors, and ſuch as do not ſurrender on Proclamation, &c. *ib.* (& ſ. 19.)

The *Malice* muſt be againſt the *Owner*, not againſt the *Animal*. - - - - - § 16.

Proof of the Priſoner's Diſlike to the Horſe injured, and Threat to do the Miſchief if his Maſter would not let him have another, which was not complied with, not ſufficient to bring the Caſe within the Black Act. *ib.*

So maiming Sheep, becauſe they overleapt Bounds, not within the Act. *ib.*

But ſemble, that Evidence of *previous* exiſting Malice againſt the Owner not neceſſary, if on the Whole the Act appear to be done from Malice to him. *ib.*

No

No Indictment lies at common Law for unlawfully *with Force and Arms* maiming a Horſe: but ſome ſpecial Force muſt be ſhewn. - § 17.

What CATTLE are within the Black Act. § 18.

Horſes are ſo. *ib.* and - § 19.

Wounding Cattle, though *the Injury be only temporary*, is within the Act, if done from Malice to Owner. § 20.

11. *In reſpect to Manufactures.* - § 21.

i. Breaking into *Houſe*, &c. *with Intent* to cut or deſtroy *Woollen Goods* in the Loom, or *Tools*, or *cutting* or *deſtroying* ſuch, a capital Felony by Stat. 22 Geo. 3. c. 40. *ib.*

ii. The ſame as to *Silk.* - § 22.

iii. The ſame as to *Linen* and *Cotton.* - § 23.

Extended to ſuch Goods put out to bleach or dry, by Stat. 4 Geo. 3. c. 37. *ib.*

iv. *Plate Glaſs.* - - - § 24.

Malicious Miſchief to ſuch in any Houſe, &c. belonging to the Plate Glaſs Company, Felony and Tranſportation. *ib.*

12, 13, & 14. *In reſpect to Highways, Turnpikes, and Bridges.* - - § 25.

i. *Highways.* Miſchief to ſuch puniſhable as Nuſance at common Law, or on ſummary Conviction before Juſtices of Peace by General Highway Act 13 Geo. 3. c. 78. *ib.*

ii. *Turnpikes.*

Deſtroying *Turnpike Gates*, *Poſts*, *Rails*, &c. or *Engines for weighing*, &c. Felony and Tranſportation, or Impriſonment for 3 Years, by Stat. 13 Geo. 3. c. 84. - § 26.

iii. *Bridges.* Nuſances to ſuch puniſhable as Miſdemeanor at common Law, and alſo by Stat. 13 Geo. 3. c. 78. on ſummary Conviction for certain petty Injuries. - - - - § 27.

Certain Bridges protected by particular Statutes. *ib.*

15. *To Mines and Engines.* - - § 28.

Coal Mines.

Burning ſuch, a capital Felony by Stat. 10 Geo. 2. c. 32. *ib.*

General Proviſions of the Black Act extended thereto. *ib.*

Drowning ſuch, ſubjects Party only to treble Damages. *ib.*

Deſtroying *Engines* for draining Mines of *Coal, Lead, Tin, Copper, or other Mineral,*—or *Bridge, Waggon-ways, or Trunks* for carrying ſuch, &c. Felony and Tranſportation. - - - § 29.

Pulling down, filling up, &c. *Airway, Waterway, Drain, Pit, Level, or Shaft,*—or damaging *Railway, Tram Road, or other Road* to ſuch Mine, &c. a Miſdemeanor ſubject to Impriſonment. - § 30.

Extends to *Acceſſaries before and Aiders. ib.*

Exception in Favour of Owners of adjoining Mines. *ib.*

16. *To Sea Banks and River Banks.* § 31.

Breaking down, &c. ſuch, maliciouſly, a capital Felony by Stat. 6 Geo. 2. c. 37. *ib.*

General Proviſions of Black Act extended to theſe Offences by Stat. 10 Geo. 2. c. 32. *ib.*

Unlawfully deſtroying, or taking away from Sea Banks, Piles, Chalk, or other Materials, 20l. Penalty on ſummary Conviction. *ib.*

Summary Juriſdiction given by Stat. 19 Geo. 2. c. 22. as to Rubbiſh thrown in Harbours, &c. *ib.*

17. *To Locks and other Works on navigable Rivers.* - - - § 32.

Maliciouſly demoliſhing ſuch, Felony and Tranſportation by Stat. 1 Geo. 2. ſt. 2. c. 19. *ib.*

Returning from Tranſportation before the Term, ouſted of Clergy by Stat. 5 Geo. 2. c. 33. *ib.*

Expences

Expences of Proſecution to be defrayed by the Truſt. § 32.

Clergy ouſted from principal Offenders and Reſcuers by Stat. 8 Geo. 2. c. 20. *ib.*

Trial and *Pardon*. *ib.*

By Stat. 4 Geo. 3. c. 12. the maliciouſly damaging or deſtroying Banks, Sluices, or other Works on Rivers made navigable by Act of Parliament; or opening Flood-gates, &c., or doing *any other wilful Hurt or Miſchief to ſuch Navigation*, or *obſtructing* the carrying it on or completing it, &c.; is made Felony and liable to Tranſportation. *ib.*

18. *In reſpect to Drainage, and Works for the Preſervation of particular Places.* § 33.

i. *Powdike in Marſhland*, by Stat. 22 Hen. 8. c. 11. *ib.*

ii. *The Bedford Level*, by Stat. 27 Geo. 2. c. 19. and other Statutes. § 34.

iii. Certain Marſhes in Norfolk, by Stat. 42 Geo. 3. c. 22. § 35.

iv. Certain Lands bordering on the Sea in Devon, by Stat. 42 Geo. 3. c. 32. § 36.

19. *To the Weſt-India Docks in the Port of London.* § 37.

Burning any of the Works, or any Veſſel lying within them, Felony without Clergy by Stat. 39 Geo. 3. c. 69. *ib.*

Deſtroying, &c. any ſuch Works, or Veſſels, puniſhable by Fine and Impriſonment, or Tranſportation. *ib.*

So cutting, &c. or in any Manner deſtroying any Rope by which any Veſſel lying in the Docks, &c. *or in any Place in the Thames between London Bridge and the Mouth of the River Lea*, is ſubjected to Penalty. *ib.*

20. *To the King's Ships, Dock-Yards, Stores, &c.* - - - § 38.

Wilfully firing or otherwiſe deſtroying ſuch, Felony without Clergy by Stat. 12 Geo. 3. c. 24. *ib.*

Trial. ib.

21. *To private Ships, Wrecks, &c.* § 39.

Deſtroying Ships by Maſter, or Mariners, &c. belonging to ſuch, Felony by Stat. 22 & 23 Car. 2. c. 11. *ib.*

By Stat. 1 Ann. ſt. 2. c. 9. ſuch Perſons wilfully caſting away, burning, or otherwiſe deſtroying Ships, to the Prejudice of their Owner, or any Merchant having Goods on board, excluded Clergy. *ib.*

Trial reſerved to Admiralty, if Offence within its Juriſdiction. *ib.*

Stat. 12 Ann. ſt. 2. c. 18. provides for aſſiſting Ships ſtranded, or in danger of being ſo. *ib.* And that Perſons entering ſuch Ships without Leave, or moleſting others in ſaving ſuch, ſhall make double Satisfaction to Party grieved, or be ſent to Houſe of Correction for 12 Months. - § 40.

Making Holes, or ſtealing Pumps, or wilfully doing any Thing tending to immediate Loſs of Ship, Felony without Clergy. - - - § 41.

By 4 Geo. 1. c. 12. if Owner, Maſter, or Mariner belonging to any Ship, wilfully caſt away, burn, or otherwiſe deſtroy it—or procure the ſame to be done, to the Prejudice of Underwriters on the Ship, or Merchants having Goods laden on board, Felony, and ouſted of Clergy by Stat. 11 Geo. 1. c. 29. *ib.*

Trial. ib.

Conſtruction on Statutes. - - - § 42.

What *a caſting away* or *deſtroying? ib.*

Muſt be to defraud *Inſurer* on the *Ship*, not on *Goods*, within that Branch. *ib.*

One who is Acceſſary to a felonious Shipwreck is not within Stat. 4 Geo. 1. c. 12. unleſs he belong to the Ship. *ib.*

But

But Plunder or Deſtruction, *by any Perſon*, of Goods on board Ship in Diſtreſs is within Stat. 12 Ann. ſt. 2. c. 18. - - - - § 43.

And they are puniſhable as *Pirates* by Stat. 8 Geo. 1. c. 24. *ib.*

And by Stat. 26 Geo. 2. c. 19. deſtroying Effects belonging to Ships in Diſtreſs, wrecked, ſtranded, or caſt on Shore, or any Part of *Furniture*, *Tackle*, *Proviſion*, or *Part of ſuch Ship*,—or *obſtructing the Eſcape* of any Perſon,—or *putting out falſe Lights* to bring Ships into Danger, Felony without Clergy. *ib.*

Trial. *ib.*

By Stat. 2 Geo. 3. c. 28. cutting or damaging Cordage, &c. fixed to Veſſels at Anchor or Mooring in the *River Thames*, liable on Conviction to Tranſportation. - - - § 44.

So obſtructing Execution of the Act. *ib.*

The King's Ships wilfully or negligently running down others, or hazarding them, &c. Offenders puniſhable with Death, or other leſs Puniſhment, by a Court Martial. - - - § 45.

Seamen and others *ſetting Fire* to any Ship, Keel, or other Veſſel, Felony without Clergy by Stat. 33 Geo. 3. c. 67. - - § 46.

Otherwiſe deſtroying or damaging the ſame, Felony and Tranſportation. *ib.*

Trial, and *Limitation* of Proſecution. *ib.*

Malicious or Fraudulent Miſchief.

§ 1.

I HAVE before adverted to this general claſs of offences in the introductory part of the laſt chapter upon arſon, which conſtitutes one of the moſt prominent of the claſs. In treating of that offence I had occaſion to mention alſo the burning of buildings of all deſcriptions, whether forming part of the dwelling-houſe or otherwiſe; as alſo the burning of ſtacks, &c. of corn, grain, ſtraw, hay, and wood, which are connected with the ſame ſubject by ſeveral ſtatutes, the conſtruction of which was more properly and conveniently conſidered

Reference to offences ejuſdem generis, under other titles.

Burning of buildings.

Stacks, &c. of corn, ſtraw, hay, and wood. *Vide* 2 Term Rep. 255.

Ch. XXII. § 1.

conſidered together. Malice againſt the perſon of the owner ſeems to be the only probable motive to the commiſſion of all thoſe offences. But it often happens that a violent, lawleſs, and deſtructive ſpirit, however generally attributable to perſonal malignity and revenge, is often incited by and accompanied with a luſt for plunder, regardleſs of the means, and hardened againſt the conſequences. Some of the offences which remain to be deſcribed are of this ſort, originating from a mixture of malice and fraud; where the end in contemplation is ſome undue gain, to be obtained by ſome violent and deſtructive means.

Pulling down or beginning to deſtroy houſes, mills, chapels.

Other offences, which might properly be claſſed under this general head, thoſe of pulling down or otherwiſe beginning to deſtroy houſes, mills, or chapels, &c. by perſons *riotouſly* aſſembled, will more conveniently be conſidered when I come to treat of *Riots*, with which they are particularly connected by the *riot*-act, and other acts in pari materiâ; the riotous aſſembly of ſuch offenders at the time being a neceſſary ingredient in the conſtitution of the offence.

Ripping, breaking, &c. iron or lead, &c. fixed to houſes.

So the mere ripping, cutting, or breaking, (if done *with intent to ſteal,*) of any lead, iron bar, iron gate, iron paliſadoe, or iron rail, or of any copper, braſs, bell-metal, utenſil, or fixture, fixed to any dwelling-houſe, outhouſe, &c. are made ſubſtantive offences, though the theft or robbery were not actually accompliſhed, by the ſtats. 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. before ſet forth in the chapter upon larceny and robbery.

Ante, 590, 1.

Nuſances.

Some few offences of leſs malignity will be noticed under the head of nuſances, to which they alſo relate.

Maims.
Ante, 392.

Others again, which are of a perſonal nature, ſuch as *maims*, have been already mentioned under the head of *Mayhem*: and another of them, that of *ſpoiling cloaths*, being connected with the perſonal aſſault on the wearer, has been treated of under the claſs of *Aſſaults*, &c.

Spoiling cloaths.
Ante, 424.

Piracy.
Ante, 792.

And Piracy will be found to comprehend other offences of this deſcription.

1. *In*

Ch. XXII. § 2. *In Northern counties.*

1. *In the Northern Counties.*

§ 2.

By the ſtat. 43 Eliz. c. 13., which has been in part before recited, for reſtraining incurſions, robberies, burning of towns, and houſes, within the counties of Cumberland, Northumberland, Weſtmoreland, and the biſhoprick of Durham, and the impriſonment and cruel treating of the inhabitants, unleſs redeeming themſelves by great ranſoms called blackmail, it is enacted that "whoſoever ſhall at any "time hereafter, without lawful authority, *take* any of the "queen's *ſubjects* againſt his or their will, and carry them "out of the ſame counties, or to any other place within "any of the ſaid counties, or detain, force, or *impriſon* "him or them as priſoners, or againſt his or their wills, to "ranſom them, or to make a *prey* or *ſpoil* of his or their "*perſon* or *goods, upon deadly feud or otherwiſe*: or whoſoever "ſhall be privy, conſenting, aiding, or aſſiſting unto any "ſuch taking, detaining, or carrying away, or procure the "taking, &c. of any ſuch perſon or perſons priſoners as "aforeſaid: or whoever ſhall *take*, receive, or carry to the "uſe of himſelf, or wittingly to the uſe of any other, any "money, corn, cattle, or other conſideration, commonly "called blackmail, for the protecting or defending of him "or them, or his or their lands, tenements, goods, or "chattels, from ſuch theſts, ſpoils, and robberies, as afore-"ſaid: or whoſoever ſhall *give* any ſuch money, &c. called "blackmail, for ſuch protection as aforeſaid; or ſhall wil-"fully and of malice *burn*, or cauſe to be burned, or aid, "procure, or conſent to the burning of any barn or ſtack "of corn or grain, within any of the ſaid counties or places "aforeſaid: and ſhall be of the ſaid ſeveral offences or any "of them indicted, and lawfully convicted, or ſhall ſtand "mute, or challenge peremptorily above 20, before the "juſtices of aſſize, gaol delivery, oyer and terminer, or of "the peace, within any of the ſaid counties at ſome of their "general ſeſſions, &c. ſhall be adjudged felons, without "benefit of clergy."

43 Eliz. c. 13. *Vide* ante, 430 and 650.

Impriſoning.

Making prey or ſpoil of perſons or goods upon deadly feud or otherwiſe.

Taking or giving blackmail.

Burning barns or ſtacks of corn. Vide ante, *Arſon*, ſ. 2.

Death.

Authority is given to the Court by a ſubſequent ſtatute of the 18 Car. 2. c. 3. before noticed, to execute or tranſport for life certain of theſe offenders, known in Northumberland and Cumberland by the name of moſs troopers.

18 Car. 2. c. 3. Ante, 650 made perpetual by 31 Geo. 3. c. 42. ſ. 1.

Tranſportation.

2. *By Burning Heath, Furze, Fern, &c.*

§ 3. *Burning heath, &c.* 4 & 5 W. & M. c. 23.

By ſtat. 4 & 5 W. & M. c. 23. ſ. 11. it is "provided and "enacted that for the better preſerving the red and black "game of grouſe, commonly called heath-cocks or heath-"polts, no perſon whatſoever, on any mountains, hills, "heaths, moors, foreſts, chaces, or other waſtes, ſhall "preſume to burn, between the 2d of *February* and 24th "of *June*, any grig, ling, heath, furze, goſs, or fern, upon *Miſdemeanor.* "pain that the offender or offenders ſhall be committed to "the houſe of correction for any time not exceeding one "month, and not leſs than ten days, there to be whipped "and kept to hard labour."

This proviſion is to be found in an act made for the general preſervation of game, which in other clauſes gives a ſummary method of proſecution and conviction before one juſtice of the peace, who, in default of the offender's paying a certain penalty, is enabled to direct the ſpecific puniſhment above deſcribed to be inflicted on him: and it is probable that the ſame method of proceeding was intended to be applied to offences deſcribed in the 11th ſection. Yet as ſuch ſummary juriſdiction is not expreſsly given to juſtices of peace, the common opinion has been, that the trial and conviction muſt be at the aſſizes, or in the ſuperior courts. Though if the fact be wilfully done, there ſeems no reaſon why the juſtices in ſeſſions may not take cognizance of it as a nuſance, or in ſome caſes even as a breach of the peace.

Vide Burn's Juſtice. tit. *Game*, ſ. 6.

28 Geo. 2. c. 19. *Summary juriſdiction to inquire and puniſh.*

The ſubſequent act of the 28 Geo. 2. c. 19. ſ. 3. does not affect to repeal the above-mentioned clauſe; but, merely reciting that the laws then in being were not ſufficient to prevent the offences, enacts, "that if any perſon or perſons, "not having a right or legal licence to do the ſame, ſhall, "after the 1ſt of *Auguſt* 1755, ſet fire to, burn, or deſtroy, "or ſhall abet, aid, or aſſiſt in or at the burning or deſtroy-"ing of any goſs, furze, or fern (*a*), growing or being in "or upon any foreſt or chace (*b*) within England, without "the licence or conſent of the owner or proprietor, or the "perſon chiefly entruſted with the care, overſight, and "cuſtody of ſuch foreſt or chace, or ſome part thereof," &c. The ſtatute then proceeds to give a ſummary juriſdiction to one or more juſtices of the peace, to convict the per-

[(*a*) Omitting the word *heath*, which is, however, mentioned in the margin of Runnington's edit. of the Stats.] [(*b*) Omitting the other general deſcription of places in the ſtat. of Wm.]

ſon

ſon ſo offending in a certain penalty, and to commit him to gaol in default of payment for a given time.

Ch. XXII. § 3. *By burning heath, &c.*

3. *By Hunters.*

§ 4. *By hunters.*

Although the ſeveral ſtatutes againſt unlawful hunters of deer include many other offences than thoſe which amount in law to larceny; yet as the acquiſition of the property is the ultimate end of every ſpecies of violence and miſchief deſcribed by thoſe ſtatutes, I thought that they might with moſt propriety be treated of under the head of Larceny and Robbery: but ſince that part of the work was printed, a very recent act of parliament has paſſed, reviſing the ſubject, and again reſtoring to the claſs of felonies many of the offences before enumerated, which were formerly made ſuch by the Black Act, but which by the conſtruction put upon the ſtat. 16 Geo. 3. c. 30. in Davies' caſe before referred to were reduced to miſdemeanors by the latter ſtatute, puniſhable in the firſt inſtance by a pecuniary forfeiture.

Ante, 608.

9 Geo. 1. c. 22.

Davies' caſe, ante, 609.

The act in queſtion is the 42 Geo. 3. c. 107. intitled "An act more effectually to prevent the ſtealing of deer."

42 G. 3. c. 107.

The firſt ſection of which enacts, "that if any perſon or perſons ſhall wilfully courſe or hunt, or take in any ſlip, nooſe, toil, or ſnare, or kill, wound, or deſtroy, or ſhoot at, or otherwiſe attempt to kill, wound, or deſtroy, or ſhall carry away, any red or fallow deer, kept or being in the incloſed part of any foreſt, chaſe, purlieu, or ancient walk, or any incloſed park, paddock, wood, or other incloſed ground, wherein deer are, have been, or ſhall be uſually kept, without the conſent of the owner of ſuch deer, or without being otherwiſe duly authorized, or ſhall knowingly be aiding, abetting, or aſſiſting therein or thereunto; every perſon ſo wilfully offending as aforeſaid, in any of the caſes above mentioned, ſhall be deemed and taken to be guilty of felony, and, being lawfully convicted thereof upon indictment, ſhall be adjudged to be tranſported for the term of ſeven years."

Hunting, &c. or taking in toil, or killing, wounding, or deſtroying deer in incloſed ground, felony and tranſportation for ſeven years.

Sect. 2. enacts, "that from and after the paſſing of this act, (26th June 1802,) if any perſon ſhall wilfully courſe or hunt, or take in any ſlip, nooſe, toil, or ſnare, or kill, wound, or deſtroy, or ſhoot at or otherwiſe attempt to kill,

In open ground a miſdemeanor, and penalty for firſt offence.

Ch. XXII. § 4. *By hunters.*

" kill, wound, or deſtroy, or ſhall carry away, any red or " fallow deer, kept or being in the unincloſed part of any " foreſt, chaſe, purlieu, or ancient walk, without the con- " ſent of the owner of ſuch deer, or without being otherwiſe " duly authoriſed, or ſhall knowingly be aiding, abetting, " or aſſiſting therein or thereunto; every perſon ſo offending " ſhall, for every ſuch act of wilful courſing or hunting, " and for every ſuch attempt to kill, wound, or deſtroy, " and for every deer ſo taken, or killed, wounded, or de- " ſtroyed, or ſhot at, or carried away as aforeſaid, in or " from any unincloſed part of any foreſt, chaſe, purlieu, " or ancient walk, forfeit and pay the ſum of fifty pounds; " and if the offender in any of the caſes aforeſaid ſhall be " a keeper of or perſon in any manner entruſted with the " care or cuſtody of deer in the foreſt, chaſe, purlieu, or " ancient walk, wherein the offence ſhall be committed, " he ſhall for every ſuch offence forfeit and pay double the " penalty herein-before enacted to be paid by other offen- " ders."

2d offence felony and tranſportation for ſeven years.

Sect. 4. enacts, " that if any perſon or perſons, after " having been duly convicted of any offence for which a " pecuniary penalty or forfeiture is impoſed, either by this " act or by the ſaid act made in the ſixteenth year of the " reign of his preſent majeſty, ſhall offend a ſecond time by " committing any offence againſt this act, for which a " pecuniary penalty or forfeiture is herein-before impoſed; " ſuch ſecond offence, whether it be the ſame offence as " the firſt offence, or be any other of the ſaid offences, " ſhall be deemed and taken to be a felon, and the perſon " or perſons guilty thereof, being lawfully convicted upon " indictment, ſhall be adjudged to be tranſported for the " term of ſeven years."

Firſt conviction to be recorded.

Sect. 5. enacts, " that the juſtice before whom any per- " ſon ſhall be convicted, for the firſt time, of any offence " againſt this act, for which a pecuniary penalty or for- " feiture is impoſed, ſhall tranſmit ſuch conviction under " his hand and ſeal to the quarter ſeſſion which next after " ſuch conviction ſhall be holden for the county, riding, or " diviſion, city, town, or place, wherein ſuch firſt offence " was committed, there to be filed by the clerk of the peace " or other proper officer, and kept amongſt the records of " the

" the court; and ſuch conviction ſo filed, or a true copy " thereof, certified by ſuch clerk of the peace or other offi- " cer, or proved to be a true copy, ſhall be ſufficient evi- " dence to prove the conviction for ſuch offence as afore- " ſaid." Ch. XXII. § 4. *By hunters.*

Sect. 6. enacts " that from and after the paſſing of this " act, ſo much of the ſaid act made in the 16 Geo. 3. " (c. 30. ſ. 1.) as impoſes or inflicts a penalty, forfeiture, or " puniſhment, on any perſon who ſhall hunt or courſe, or " take in any ſlip, nooſe, toil, or ſnare, or kill, wound, or " deſtroy, or ſhoot at or otherwiſe attempt to kill, wound, " or deſtroy, or carry away, any fallow deer in any foreſt, " chaſe, purlieu, or ancient walk, whether incloſed or not, " or in any incloſed park, paddock, wood, or other incloſed " ground, where deer were or had been or ſhould be " uſually kept, without the conſent of the owner, or with- " out being otherwiſe duly authoriſed, or who ſhall be aid- " ing, abetting, or aſſiſting therein, ſhall, with reſpect to " the ſaid offences, committed after the paſſing of this act, " be and the ſame is hereby repealed." *Repeal of* 16 G. 3. c. 30. ſ. 1.

By ſ. 3. the general proviſions of the ſtat. 16 Geo. 3. c. 30. as to the ſeizing, apprehending, and conviction of offenders, or for recovery, &c. of penalties, &c. and the *time* of bringing actions or *proſecutions*, &c. and as to pleading, and coſts, &c. ſhall, as far as the ſame reſpectively are applicable, be in force, in ſeizing, apprehending, and convicting offenders againſt this act, and in the recovery, application, and diſpoſal of the penalties, and with reſpect to the time and manner of appealing from convictions, &c.

By ſ. 7. this act is not to extend to Scotland or Ireland.

There are however other clauſes in the ſtatute 16 Geo. 3. which are ſtill in force, touching theſe offenders. One againſt the wilful deſtruction of pales or walls incloſing deer, which I ſhall preſently notice. 16 Geo. 3. c. 30. Poſt. ſ. 11.

Alſo by ſ. 9. of the ſame ſtatute, " If any perſon or per- " ſons carrying any gun, or other fire arms, or any ſword, " ſtaff, or other offenſive weapon, ſhall come into any foreſt, " chace, purlieu, or ancient walk, or into any incloſed " park, paddock, wood, or into any other ground where " deer are uſually kept, be the ſame incloſed or not in- " cloſed, 16 Geo. 3. c. 30. ſ. 9. *Carrying arms where deer are kept or with intent to hunt, &c. or reſiſting keepers, &c. felony and tranſportation.*

Ch. XXII. § 4. *By hunters.*

" cloſed, with an intent unlawfully to ſhoot at, courſe, or " hunt, or to take in any ſlip, nooſe, toil, ſnare, or other " engine, or to kill, wound, deſtroy, or take away, any red " or fallow deer; it ſhall be lawful for every ranger or " keeper, or perſon entruſted with the care of ſuch deer, to " ſeize and take from ſuch perſon and perſons, in and upon " ſuch foreſt, chace, purlieu, ancient walk, park, paddock, " wood, or other ground, to and for the uſe of the owner " thereof reſpectively, all ſuch guns, fire-arms, ſlips, nooſes, " toils, ſnares, or other engines, and all dogs there brought " for courſing deer, in the ſame and like manner as the " gamekeepers of manors are empowered by law within their " reſpective manors to ſeize and take dogs, nets, or other " engines in the cuſtody of perſons not qualified by the laws " to keep the ſame: and if any ſuch perſon or perſons ſhall " there unlawfully beat, or wound, any ranger or keeper, or " his or their ſervants or aſſiſtants in the execution of his " or their office or offices; or ſhall attempt to reſcue any " perſon in the lawful cuſtody of any ſuch ranger, keeper, " ſervant, or aſſiſtant; every perſon ſo offending ſhall be " adjudged guilty of felony, and on being lawfully con- " victed on indictment ſhall be tranſported to one of his " Majeſty's Plantations in America for the ſpace of 7 years."

Vide 39 & 40 Geo. 3. c. 50. as to ſuch acts done with intent to kill game.

Pardon.

Offenders againſt this act diſcovering any other offender againſt the ſame, ſo as ſuch offender be duly convicted, ſhall by ſ. 17. be diſcharged of all forfeitures and penalties of the act previous to ſuch diſcovery. And by ſ. 25. " Every " proſecution for any offence againſt this act ſhall be com- " menced within 12 calendar months, but not after, from " the time of the offence committed." By ſ. 28. the act is not to extend to Scotland.

Limitation of proſecution.

4. *In reſpect to Timber and other Trees, Woods, Coppices, &c. and other Wood in general; Roots, Plants, &c.*

§ 5. *Trees, wood, underwood, &c.*

The next claſs of offences, relating to the injury or deſtruction of timber, and other trees, woods, underwoods, &c. has engaged much of the attention of the Legiſlature at different periods, and ſome confuſion has ariſen for want of a more connected and general view of the ſubject. I ſhall

firſt

firſt give the principal ſtatutes in order of time, and then point to the leading diſtinctions to be obſerved in them.

37 H. 8. c. c. 6. *Vide* ante. *Barking fruit trees, treble damages, and fine.*

By the ſtat. 37 Hen. 8. c. 6. "If any perſon or perſons maliciouſly, willingly, or unlawfully bark any apple trees, pear trees, or other fruit trees of any other perſon or perſons, every ſuch offender ſhall not only forfeit unto the party grieved treble damages for ſuch offence or offences, the ſame to be recovered by action of treſpaſs, but alſo ſhall forfeit to the King 10l. in the name of a fine."

Damages againſt the pariſh, &c. where fruit trees, timber, or other trees deſtroyed. 1 G. 1. ſt. 2. c. 48.

The ſtat. 1 Geo. 1. ſt. 2. c. 48. after providing that if any perſon ſhall maliciouſly break down, cut up, pluck up, throw down, bark, or otherwiſe deſtroy, deface, or ſpoil any timber tree or trees, fruit tree or trees, "or any other tree or trees," the party injured ſhall recover damages againſt the inhabitants of the pariſh, vill, &c. or place where ſuch tree, &c. ſhall be ſo maliciouſly broken down, &c. in the ſame manner and form as damages are to be yielded for hedges and dikes overthrown by perſons in the night by the ſtat. 13 Ed. 1. ſt. 1. c. 46.; and providing (ſ. 2.) for the conviction and puniſhment of the offenders for the treſpaſſes and offences aforeſaid by two or more juſtices of the peace in or out of Seſſions; and reciting (ſ. 4.) that "whereas divers woods, underwoods, and coppices have been heretofore and lately ſet on fire, or burnt, to the great diſcouragement of planting; enacts and *declares*, that if any perſon or perſons ſhall after the 24th of June 1716 maliciouſly ſet on fire or burn, or cauſe to be burnt, any wood, underwood, or coppice, or any part thereof, ſuch malicious ſetting on fire, burning, or cauſing to be burnt, ſhall be and is hereby declared and made felony; and the offender and offenders ſhall ſuffer and be liable to all the penalties and forfeitures as other felons by the law now are."

Burning wood, underwood, and coppices, felony.

Vide ſt. 7 Ann. c. 21. as to Scotland.

Vide ſt. 35 H. 8. c. 17. 43 Eliz. c. 7. 13 Car. 2. c. 2. and 22 & 23 Car. 2. c. 7.

Offences of this nature were before this treated only as treſpaſſes and miſdemeanors by ſeveral ſtatutes. And ſoon after the paſſing of the above law another act paſſed, the recital and proviſions of which are not eaſily to be reconciled with the 4th clauſe of it, except upon the ground hereafter ſuggeſted with reſpect to the black act.

Ch. XXII. § 5. *Timber, wood, &c.*

6 Geo. 1. c. 16. *Extending damages againſt pariſh, &c. for deſtruction of woods, &c. and fences and incloſures of the ſame, whether done by day or night.*

The ſtat. 6 Geo. 1. c. 16. entitled, "An act to explain "and amend" the former act, reciting certain miſchiefs after mentioned; and that "ſome doubts have ariſen whether the offences committed *in the day-time* mentioned in "that act are puniſhable by the ſaid act. And whereas "there is no proviſion made in the ſaid act for puniſhing "the offences committed by perſons who ſhall break open, "throw down, level, or deſtroy the hedges, gates, poſts, "ſtiles, railing, fences, ditches, banks, walls, or other in-"cloſures of ſuch woods, wood grounds, plantations, and "coppices: therefore, for the explaining and amending the "ſaid act, and for remedying the ſeveral miſchiefs herein-"before mentioned, and for the better preſerving of all ſuch "wood ſprings, or ſprings of wood, poles, quick-woods, "plantations, underwoods, coppice woods, gates, poſts, "ſtiles, railing, fences, hedges, walls, and other incloſures "of woods, from being unlawfully cut, taken, ſpoiled, "broken, burnt, deſtroyed, defaced, or carried away; and "for the better diſcovering and more effectual puniſhment "of ſuch offenders therein, their aiders and abettors; and "for the providing ſatisfaction for the damages the reſpec-"tive proprietors thereof ſhall ſuſtain thereby," enacts, "that if any perſon or perſons after the 24th of June 1720 "ſhall either by day or by night cut, take, deſtroy, break, "throw down, bark, pluck up, *burn*, deface, ſpoil, or carry "away, any wood ſprings or ſprings of wood, trees, poles, "*wood*, tops of trees, *underwoods*, or *coppice woods*, thorns, "or quickſets, without the conſent of the owner of ſuch "woods, wood grounds, parks, chaces, or coppices, planta-"tions, timber trees, fruit trees, or other trees, thorns, or "quickſets, or of the perſons chiefly entruſted with the care "and cuſtody thereof; or ſhall break down, throw down, "level, or deſtroy any hedges, gates, poſts, ſtiles, railing, "walls, fences, dikes, ditches, banks, or other incloſures of "ſuch woods, wood ground, parks, chaces, or coppices, "plantations, timber trees, fruit trees, or other trees, "thorns, or quickſets," the party grieved ſhall recover damages againſt the pariſh, &c. in the ſame manner and form as for dikes and hedges overthrown by perſons *in the night*, or at another ſeaſon when they ſuppoſe not to be eſpied, as is provided by the ſtat. 13 Ed. 1. ſt. 1. c. 46.

Then

Ch. XXII § 5. *Timber, wood, &c.*

Then by ſ. 2. it is further "enacted and *declared*, that "if any perſon or perſons, at any time after the ſaid 24th "of June, in a riotous, open, tumultuous, or in a ſecret and "clandeſtine manner, forcibly, or wrongfully, and *malici-* "*ouſly*, and without the conſent of the proprietor, wood- "reeve, wood-keeper, or perſon chiefly intruſted with the "care, overſight and cuſtody of ſuch *woods*, *wood-grounds*, "parks, chaces, *coppices* or plantations, ſhall cut down, de- "ſtroy, break, bark, throw down, *burn*, take, deface, ſpoil, "or carry away, any *wood* or ſprings of *wood*, *underwood*, or "*coppice wood*; or ſhall in ſuch a riotous, forcible, tumul- "tuous, ſecret, or clandeſtine manner as aforeſaid, malici- "ouſly break open, throw down, level or deſtroy any "hedges, gates, poſts, ſtiles, rails, fences, ditches, banks, or "incloſures of ſuch woods, wood grounds, coppices, planta- "tions, timber trees, fruit trees, or other trees, thorns, or "quickſets; that then it ſhall and may be lawful to and "for any two or more juſtices of the peace of the county, "&c. wherein any ſuch offence or offences ſhall be com- "mitted, or for the juſtices in open ſeſſions, upon complaint "to them made by any inhabitant of the aforeſaid pariſh, "&c. or place, or of the owner of ſuch tree or trees, "woods, wood grounds, parks, chaces, coppices, or plan- "tations, or of any other, to cauſe ſuch offender or offen- "ders to be apprehended for the *treſpaſſes* and offences "aforeſaid, or any of them, and to hear and finally deter- "mine and adjudge all and every the offence and offences "aforeſaid. And if ſuch juſtices ſhall convict any perſon "or perſons of all or any of the treſpaſſes and offences afore- "ſaid, then ſuch juſtices, immediately after ſuch convic- "tion, ſhall and are hereby required to inflict *all and every* "*the ſame penalties and puniſhments in the ſaid act of the firſt* "*Geo.* 1. *herein-before mentioned*, as fully and largely, and in "the ſame manner, for all and every the crimes and "offences herein-before expreſſed, although not contained "in the ſaid act, as if the ſame were here again repeated "and re-enacted."

Deſtroying woods, underwoods, coppices, plantations, trees, &c. inquirable by juſtices of peace, and puniſhable as under ſtat. 1 Geo. 1. ſt. 2. c. 48.

In like manner the ſtat. 29 Geo. 2. c. 36. which enables the proprietors of waſtes, woods, and paſtures, wherein any others have common of paſture, with the aſſent of the major part in number and value of the owners, &c. to in-

Ch. XXII. § 5. *Timber, wood, &c.*

cloſe the ſame for the growth and preſervation of timber or underwood, and gives an appeal in certain caſes to the parties grieved, by

29 Geo. 2. c. 36. ſ. 6. *Damages againſt the parſh, &c. extended to trees in new incloſures.*

Sect. 6. enacts, that "if any perſon, from and after the "time hereby limited for bringing ſuch appeal againſt any "ſuch agreement for the incloſure of any part of ſuch "waſtes, woods, or paſtures, ſhall either by day or by night "unlawfully cut, take, deſtroy, break, throw down, bark, "pluck up, burn, deface, ſpoil, or carry away, any trees "growing within ſuch incloſure, without the conſent of the "owner or owners thereof, ſuch owner or owners ſhall have "ſuch remedy, and have and receive ſuch ſatisfaction and "recompence of and from the inhabitants of the pariſhes, "&c. or places adjoining to ſuch incloſures, and recover "ſuch damages againſt the inhabitants of ſuch pariſhes, "&c. and in the ſame manner and form, as is directed for "dikes and hedges overthrown by the ſaid act made in the "13th Edward I.; unleſs the offender or offenders ſhall be "convicted of ſuch offence within the ſpace of ſix months "next after the commiſſion thereof." And then by ſ. 7. "It ſhall and may be lawful for any two juſtices of the "peace of the county, &c. wherein any ſuch offence ſhall "be committed, or for the juſtices in ſeſſions, &c., upon "complaint to them made, to cauſe every ſuch offender to "be apprehended for ſuch *treſpaſs*, and to hear and deter- "mine the ſame, and to inflict the like penalty and puniſh- "ment on every offender by them convicted as is directed "to be inflicted on offenders by the ſtat. 6 Geo. 1. c. 16." And by ſ. 8. "If any perſon after the 1ſt of July 1756 ſhall "unlawfully cut, take, deſtroy, break, throw down, bark, "pluck up, burn, deface, ſpoil, or carry away, any tree "growing in any waſte, wood, or paſture in which any "perſon or perſons, or body or bodies politic or corporate, "have right of common, every ſuch offender ſhall and may "be in like manner convicted of ſuch offence, and ſhall in- "cur the like penalty."

Vide the explanatory act of 31 Geo. 2. c. 41. *and juriſdiction of ſuch treſpaſſes given to juſtices of peace as under ſtat.* 6 Geo. 1. c. 16.

§ 6. *Conſtruction of ſtatutes.*

Upon theſe proviſions it may be obſerved, that although the doubt recited in the preamble of the ſtat. 6 Geo. 1. c. 16. ſeems principally to refer to the offences mentioned in the firſt ſection of the ſtat. 1 Geo. 1. ſt. 2. c. 48., which were made

made puniſhable by the ſecond ſection as treſpaſſes upon ſummary conviction before two magiſtrates; and not to relate to the offences declared to be felony by the 4th ſection of the laſtmentioned ſtatute; becauſe the doubt there expreſſed could have no reference to ſuch 4th ſection; yet the offences deſcribed in that ſection ſeem to be, in part at leaſt, included in the 2d ſection of the ſtat. 6 Geo. 1. c. 16. wherein they are again treated as *treſpaſſes*, and ſubjected to the ſummary juriſdiction of two magiſtrates. But what is more remarkable, ſuch juſtices of the peace have power given them to inflict "*all and every the ſame penalties and puniſh-*"*ments* in the ſaid act of the 1 Geo. 1. therein before men-"tioned, as fully and largely, and in the ſame manner, *for* "*all and every the crimes and offences herein before expreſſed*," although not contained in the ſaid act, as if the ſame "were here again repeated and re-enacted." Yet it is hardly to be imagined that the Legiſlature meant to enable two juſtices of the peace out of ſeſſions to convict a perſon of felony, or to ſubject a perſon to the pains and penalties of felony for any offence which as a treſpaſs is referred to the cognizance of ſuch ſummary juriſdiction.

Ch. XXII. § 6. *Timber, wood, &c.*

§ 7.

Again, by the Black Act 9 Geo. 1. c. 22. ſ. 1. "If any "perſon or perſons (whether armed or diſguiſed as men-"tioned in the preceding part of the clauſe, or not) ſhall "unlawfully and maliciouſly cut down or otherwiſe deſtroy "any trees planted in any avenue, or growing in any gar-"den, orchard, or plantation, for ornament, ſhelter, or pro-"fit; or ſhall forcibly reſcue any perſon being lawfully in "cuſtody of any officer or other perſon for any the offences "before mentioned; or if any perſon or perſons ſhall by "gift or promiſe of money or other reward procure any of "his majeſty's ſubjects to join him or them in any ſuch "unlawful act; every perſon ſo offending, being thereof "lawfully convicted, ſhall be adjudged guilty of felony "without benefit of clergy."

9 Geo. 1. c. 22. ſ. 1. *Unlawfully and maliciouſly deſtroying ornamental, uſeful, or profitable trees in avenues, &c. a capital felony.*

By ſ. 14. the trial may be in any county in England; and this is at the option of any private proſecutor.

Ante, tit. *Arſon*, and 2 Blac. Rep. 733.

This act was made perpetual by ſtat. 31 Geo. 2. c. 42.

The ſubſequent ſtatute of the 6 Geo. 3. c. 36. (which takes no notice of the laſt-mentioned law) after reciting that

6 Geo. 3. c. 36. *Deſtroying or ſtealing of timber*

Ch. XXII. § 7. *Timber, wood, &c.*

" divers persons have of late years *wilfully and maliciously* " cut down, barked, or otherwise destroyed, timber trees, " and trees standing for and likely to become timber, grow- " ing as well in the several forests, chaces, and other open " grounds, as in the woods, and plantations, and inclosed " grounds, within this kingdom, to the great detriment of " the owners of such trees, and to the discouragement of " planting," &c.; and reciting further the practice of plundering nursery grounds, &c. of valuable roots, shrubs, and plants; enacts, " that after the 2d of June 1766 " all and every person and persons who shall *in the night-* " *time* lop, top, cut down, break, throw down, bark, *burn*, " or *otherwise spoil* or *destroy*, or carry away, any oak, beach, " ash, elm, fir, chesnut, or asp, timber tree, or other tree " or trees standing for timber, or likely to become timber, " without the consent of the owner or owners thereof first " had and obtained; or shall *in the night-time* pluck up, dig " up, break, spoil, or destroy, or carry away, any root, " shrub, or plant, roots, shrubs, or plants, of the value of " 5 s., and which shall be growing, standing, or being in the " garden ground, nursery ground, or other inclosed ground " of any person or persons whomsoever, shall be deemed " and construed to be guilty of felony; and every such per- " son or persons shall be subject and liable to the like pains " and penalties as in cases of felony: and the Court before " whom such person or persons shall be tried, shall and " hereby have authority to transport such person or persons " for seven years to any of his majesty's plantations in " America, in like manner as other felons are directed to " be transported by the laws and statutes of this realm. " And all and every person and persons who shall be *wil-* " *fully* aiding, abetting, or assisting in such cutting down, " breaking, throwing down, barking, burning, or otherwise " spoiling, or destroying, or carrying away, any such oak, " beach, ash, elm, fir, chesnut, or asp, timber tree, or other " tree or trees standing for timber, or likely to become " timber, as aforesaid; or in such plucking up, digging up, " cutting, breaking, spoiling, or destroying, or carrying " away, such root, shrub, or plant, roots, shrubs, or plants, " as aforesaid, of the value aforesaid; or who shall buy or " receive such root, shrub, or plant, roots, &c. of the value

Trees, or trees likely to become such, in open or inclosed grounds, a simple felony.

Extended to root, shrub, or plant, of 5 s. value. Vide post, 6 Geo 3. c. 48.

Transportation for seven years.

Aiders and abettors.

" aforeſaid, knowing the ſame to be ſtolen, ſhall be ſubject " and liable to the ſame puniſhment as if he, ſhe, or they " had ſtolen the ſame, any law to the contrary in any wiſe " notwithſtanding." Ch. XXII. § 7. *Timber, wood, &c.*

The name of the owner of the trees muſt be truly ſtated in the indictment, otherwiſe it is fatal. R. v. Patrick and Pepper, O. B. Feb. 1783, cor. Buller J. and Perryn B. 1 Leach, 287.

By another act paſſed in the ſame ſeſſion of parliament, " Every perſon who ſhall *wilfully* cut or break down, bark, " burn, pluck up, lop, top, crop, or otherwiſe deface, da- " mage, ſpoil, or deſtroy, or carry away, any timber tree or " trees, or trees likely to become timber, or any part there- " of, or the lops or tops thereof, without the conſent of the " owner or owners thereof firſt had, or in any of his ma- " jeſty's foreſts or chaces, without the conſent of the ſur- " veyor or ſurveyors, or his or their deputy or deputies, or " perſon or perſons entruſted with the care of the ſame," ſhall on conviction before one or more juſtices of the peace for the firſt offence forfeit not exceeding 20l., together with the charges of ſuch conviction, &c., and on non-payment to be committed to the common gaol not exceeding 12 nor leſs than 6 months, or until the penalty and charges be paid: for 2d offence a ſum not exceeding 30 l. and charges, and on non-payment to be committed not exceeding 18 months nor leſs than 12 months, or until the penalty and charges ſhall be paid; " and if any perſon ſo convicted ſhall be " guilty of the like offence a third time, and ſhall be thereof " convicted in like manner (*a*), ſuch perſon ſhall be deemed " guilty of felony; and the Court before whom he ſhall be " tried ſhall and hereby have authority to tranſport ſuch " perſon or perſons for 7 years to any of his majeſty's plan- " tations in America, in like manner as other felons " are directed to be tranſported by the laws and ſtatutes of " this realm." 6 Geo. 3. c. 48. *Spoiling or deſtroying timber trees, &c.; for 1ſt offence fine and imprisonment; felony and tranſportation for 2d offence.*

By ſ. 2. " All oak, beech, cheſnut, walnut, aſh, elm, cedar, " fir, aſp, lime, ſycamore, and birch trees, ſhall be deemed " and taken to be timber trees within the true meaning " and proviſion of *this* act." To which the ſtat. 13 Geo. 3. c. 33. adds " poplar, alder, larch, maple, and hornbeam," in the ſame manner as if inſerted in the laſtmentioned act. 13 Geo. 3. c. 33.

(*a*) *Vide* the obſervation on the words " *in like manner*," ante, 590.

Ch. XXII. § 7. *Timber, wood, &c.*

6 Geo 3 c. 48. *Plucking up, ſpoiling, or deſtroying roots, ſhrubs, or plants in cultivated lands; 1ſt and 2d offence a penalty, 3d offence felony, tranſportation.* *Vide* ante.

Again, the 3d ſection of the ſtat. 6 Geo. 3. c. 48. enacts alſo generally, "that after the 24th of June 1766 all and "every perſon who ſhall pluck up, or cut, ſpoil, or deſtroy, "or take or carry away, any root, ſhrub, or plant, roots, "ſhrubs, or plants, out of the fields, nurſeries, gardens, or "garden-grounds, or other cultivated lands of any perſon "or perſons whomſoever, without the conſent of the owner "or owners thereof firſt had, and ſhall be thereof convicted, "&c. before any one or more juſtice of the peace, &c. "ſhall for the firſt offence forfeit ſuch ſum as to the juſtice, "&c. ſhall ſeem meet, not exceeding 40s., together with "the charges, &c.; for the ſecond offence a ſum not ex-"ceeding 5l. together with the charges, &c.; and if any "perſon ſo before convicted ſhall a third time commit the "like offence, and ſhall be thereof convicted, ſuch perſon "ſo convicted ſhall for ſuch third offence be deemed guilty "of felony, and the Court before whom he ſhall be tried "ſhall and hereby have authority to tranſport ſuch perſon "for 7 years to any of his Majeſty's plantations in America, "in like manner as other felons are directed to be tranſport-"ed by the laws and ſtatutes of this realm."

f. 4. *Cutting, ſplitting, ſpoiling, damaging, or deſtroying, &c any kind of wood, underwood, poles, ſticks of wood, green ſtubs, &c.*

Alſo by f. 4. of the ſame act, reciting "that diſorderly "perſons have made a practice of going into the woods, "underwoods, and wood-grounds of others, and there cut "and carried away great quantities of young wood of vari-"ous kinds, for making of poles and walking-ſticks, and "various other uſes; and in beech and other woods and "underwoods, under pretence of getting firewood, have "cut down, boughed, ſplit off, or otherwiſe damaged or "deſtroyed the growth of the ſaid woods, &c.; and that "the laws in being were not ſufficient to remedy the evil;" it is enacted "that all and every perſon and perſons who "after the 24th of June 1766 ſhall go into the woods, un-"derwoods, or wood-grounds of any of his Majeſty's ſub-"jects, not being the lawful owner or owners thereof, and "ſhall there cut, lop, top, or ſpoil, ſplit down, or damage, "or otherwiſe deſtroy, any kind of wood or underwood, "poles, ſticks of wood, green ſtubs, or young trees, or carry "or convey away the ſame," or ſhall have the ſame in their cuſtody, and ſhall not give a ſatisfactory account how they came by the ſame, and ſhall be thereof convicted before one

or having ſame in cuſtody, without good account, miſdemeanor.

or

or more juſtices of the peace, &c.; ſhall for the firſt offence forfeit a ſum not exceeding 40s. with the charges, &c.; for the ſecond offence a ſum not exceeding 5l. and charges, &c.; and for the third offence ſhall, being duly convicted thereof according to law, be deemed an incorrigible rogue, and ſhall be puniſhed as ſuch.

Ch. XXII. § 7. *Timber, wood, &c.*

§ 8. *General view of the ſeveral ſtatutes.*

It is extraordinary that the two acts of the 6 Geo. 3. c. 36. and c. 48. ſhould have paſſed in the ſame ſeſſion of parliament upon the ſame ſubject matter, without any reference to each other, enacting ſuch different proviſions. This diſtinction however was before remarked between them on another occaſion, that if any of the offences therein mentioned be committed *in the night-time*, it is felony by the firſt-mentioned act; otherwiſe it is no more than a miſdemeanor puniſhable in the manner deſcribed in the ſecond act, except upon a third offence after two former convictions, in which caſe alſo it is made felony by the ſecond act. In the caſe of Hitchcock and Howe there referred to, the Judges held it to be diſcretionary in the Court to paſs ſentence of tranſportation on the offender under the firſt act, or any other ſentence which could be paſſed for a ſingle felony, or to ſuperadd tranſportation to the latter.

Ante, tit. *Larceny*, 588, 9.

R. v. Hitchcock and Howe, MS Jud. Ante, 588.

It is no leſs ſingular that the offences created by the Black Act before deſcribed ſhould be altogether overlooked in the latter ſtatutes (*a*), the wording of which approximates ſo nearly to the Black Act, and though the offences created by the latter ſtatutes are ſo much leſs penal than thoſe named in the other. The offences in the Black Act, which conſiſt in "cutting down, or otherwiſe deſtroying any *trees* planted "in any *avenue* or growing in any *garden*, *orchard*, or *plantation*, for *ornament*, *ſhelter*, or *profit*," muſt be charged to be done "*unlawfully and maliciouſly*," in the words of the act: theſe words are not to be found in the enacting part of the ſtat. 6 Geo. 3. c. 36. which deſcribes the acts therein prohibited to be done in general terms; but the words "*wilfully and maliciouſly*" are annexed to the deſcription of the ſame offences deſcribed in the preamble; and therefore

Ante, 1057.

Vide ante, 638.

(*a*) The only reference to the Black Act is in ſ. 9. of the ſtat. 29 Geo. 2. c. 36. which was to obviate any concluſion that the remedies given by ſtats. 1 & 6 Geo. 1. againſt the pariſh, &c. for damages were intended to be repealed by the Black Act giving a like remedy againſt the hundred.

Ch. XXII. § 8. *Timber, wood, &c.*

it may be doubtful whether they do not enter into the neceſſary deſcription of the offences enacted: and the word *wilfully* is expreſsly inſerted in the enacting part of the correſponding ſtatute of the 6 Geo. 3. c. 48.; and alſo in that part of the ſtat. 6 Geo. 3. c. 36. which reſpects aiders and abettors. Alſo the Black Act has the word *trees* in the plural, whereas the latter ſtatutes have the words "*tree* or *trees*." But it may be doubtful whether the former expreſſion may not be conſtrued *ſingulariter*, as other ſtatutes in the plural have been ſometimes interpreted where the ſenſe pointed to it. Beſides which the Black Act extends to "*any* trees," in the places there pointed out; whereas the ſtatutes of the 6th of Geo. 3. are confined to *timber* trees or *trees ſtanding for and likely to become timber*. Theſe latter however comprehend all ſuch trees growing not only in open grounds but in "woods, "*plantations*, and *incloſed grounds*," as ſtated in the preamble, which general deſcription ſeems to cover the more particular deſcription of places mentioned in the Black Act. But the moſt important diſtinction of all is, I apprehend, the view and intent of the Black Act contraſted with the other ſtatutes. Suppoſing that the words "*wilfully and maliciouſly*" which occur in the preamble of the ſtat. 6 Geo. 3. c. 36, of which the firſt only is uſed in the enacting part of the ſtat. 6 Geo. 3. c. 48. are a deſcriptive part of the offence under thoſe ſtatutes, yet the whole ſcope of thoſe ſtatutes, which were intended for the protection of the property itſelf from depredation, ſhews that the word *maliciouſly* is only to be taken in its moſt general ſignification, as denoting an unlawful and bad act, an act done malo animo from an unjuſt deſire of gain, or a careleſs indifference of miſchief. Whereas, in order to bring an offender within the penalty of death under the Black Act, the *malice* muſt be perſonal againſt the *owner* of the property. This has been expreſsly holden with reſpect to the offence of killing, maiming, or wounding cattle; and the two offences are deſcribed in the ſame paragraph of the clauſe, and muſt therefore have the ſame conſtruction. The words run thus: "If any perſon or perſons "ſhall unlawfully and maliciouſly kill, maim, or wound "any cattle, or cut down or otherwiſe deſtroy any trees "planted in any avenue," &c. And perhaps the ſame diſtinction was in the contemplation of the Legiſlature, when they made the 4th clauſe of the ſtat. 1 Geo. 1. ſt. 2 c. 48,

Ante, 598. 615. and tit. *Arſon*, (22 & 23 Car.), and *vide* Haſſel's caſe, 1 Leach, 1.

c. 48. and when they afterwards paſſed the ſubſequent act of the 6 Geo. 1. c. 16. followed up by the two ſtatutes in the 6 Geo. 3.; more particularly when that 4th clauſe, conſidered by Mr. Juſtice Blackſtone to be ſtill in force, is viewed as contraſted with the 1ſt and 2d clauſes of the ſame ſtatute, which are ejuſdem generis with thoſe ſubſequent ſtatutes: and this conſtruction can alone reconcile all the ſeveral proviſions.

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4 Blac. Com. 245.

§ 9.

By ſtat. 37 Hen. 8. c. 6. "If any perſon or perſons "maliciouſly, willingly, or unlawfully do burn or cauſe to "be burned any heap or heaps of wood of any other per- "ſon or perſons, prepared, cut, and felled, or to be prepared, "cut, or felled, for making of coals, billets, or talwood; "then every ſuch offender and offenders ſhall not only "loſe and forfeit unto the party grieved treble damages for "ſuch offence or offences, (the ſame to be recovered by ac- "tion of treſpaſs,) but alſo ſhall forfeit to the King for every "ſuch offence 10l. in the name of a fine."

37 H. 8. c. 6. *Burning heaps of wood prepared for making coal, &c.*

The offence herein deſcribed ſeems by the preamble to be pointed at ſuch as commit it from a motive of malice to the owner of the property; for it recites that "malicious and "*envious* perſons being men of evil and perverſe diſpoſi- "tions, &c. *and minding the hurt, undoing, and impoveriſh- "ment of true and faithful ſubjects*, have of late invented a "new damnable kind of vice, &c. and damnifying of the "King's true ſubjects, &c. in committing ſuch and ſuch "offences."

5. *Burning Wains or Carts laden with Goods.* § 10.

The laſtmentioned ſtatute ſubjects to the ſame puniſh- ment "any perſon or perſons who ſhall maliciouſly, wil- "fully and unlawfully burn or cauſe to be burned any wain "or cart laden or to be laden with coals or any other goods "or merchandizes of any other perſon or perſons."

37 H. 8. c. 6. *Burning carts laden with goods.*

6. *Deſtroying Fences and Incloſures.* § 11.

Some proviſions againſt the deſtruction of the fences of wood grounds have been already adverted to in the ſtat.

Fences and incloſures. Ante, ſ. 5.

Ch. XXII. § 11. *Fences and incloſures.*

6 Geo. 1. c. 16. which refers to the remedy provided by the ſtat. 13 Ed. 1. ſt. 1. c. 46. This latter ordains, that "where "one having right to approve doth then levy a dike or an "hedge, and ſome by night, or at another ſeaſon when they "ſuppoſe not to be eſpied, do overthrow the hedge or dike, "and it cannot be known by verdict of the aſſize or jury "who did overthrow the hedge or dike; and men of the "towns near will not indict ſuch as be guilty of the fact, "the towns near adjoining ſhall be diſtrained to levy the "hedge or dike at their own coſt, and to yield damages."

13 Ed. 1. ſt. 1. c. 46. *Damages to be recovered againſt the adjoining towns for hedges, &c. overthrown.*

2 Inſt. 476.

This preſumes the offence to be indictable; and Lord Coke ſays, that the indictment is to be either of a riot, force, or treſpaſs; and that no particular time being appointed for the next towns round about adjoining to indict the miſdoers, the law appoints a year and a day for that purpoſe; and by the indictment the lord ſhall know againſt whom to bring his action. But the latter opinions ſeem to be, that the towns muſt indict the miſdoers within a convenient time; otherwiſe upon the return of a writ of noctanter a diſtringas ſhall iſſue againſt the inhabitants, though within a year and a day.

Vide Creſwick's caſe, Skin. 94. Dean Foreſt caſe, Cro. Car. 270. R. v. Epworth, &c. ib. 439. and ib. 580.

9 Geo. 3 c. 29. ſ. 3. *Deſtroying incloſures made under act of parliament.*

By ſtat. 9 Geo. 3. c. 29. ſ. 3. "If any perſon or perſons "ſhall after the 1ſt of July 1769 wilfully or maliciouſly ſet "fire to, burn, demoliſh, pull down, or otherwiſe deſtroy "or damage, any fence or fences that are or ſhall be erected, ſet up, provided, or made, for dividing or incloſing any "common, waſte, or other lands or grounds, in purſuance "of any act or acts of parliament; every ſuch perſon being lawfully convicted of any or either of the ſaid ſeveral "offences, or of cauſing or procuring the ſame to be done, "ſhall be adjudged guilty of felony, and ſhall be ſubject to "the like pains and penalties as in caſes of felony; and "the Court before whom ſuch perſon ſhall be tried ſhall "have authority to tranſport ſuch felon for 7 years, in like "manner as other felons," &c. The proſecution to be commenced within eighteen months after the offence committed, by ſ. 4.

16 Geo. 3. c. 30. ſ. 8. *Deſtroying pales, &c. where deer are kept.*

By ſtat. 16 Geo. 3. c. 30. ſ. 8. "If any perſon or perſons ſhall at any time wilfully pull down or deſtroy, or "cauſe to be wilfully pulled down or deſtroyed, the pale or "pales, or any part of the walls of any foreſt, chaſe, pur-

"lieu,

" lieu, antient walk, park, paddock, wood, or other ground " where any red or fallow deer ſhall be then kept, without " the conſent of the owner or perſon chiefly intruſted with " the cuſtody thereof, or being otherwiſe duly authoriſed; " every perſon ſo offending ſhall be ſubject to the forfei- " ture and penalty hereby inflicted for the firſt offence of " killing any deer;" that is, he ſhall forfeit 30l. on conviction before one juſtice of the peace, who in caſe of non-payment of ſuch penalty has (by ſ. 12.) power to commit. By ſ. 25. the proſecution muſt be commenced within 12 calendar months after the offence committed. Ch. XXII. § 11. *Fences and incloſures.*

Offenders of this deſcription were alſo ſubjected to treble damages to the party grieved, and to impriſonment for three months and finding ſureties for ſeven years, by the ſtat. 5 Eliz. c. 21. 5 Eliz. c. 21.

7. *Breaking down Mounds of Fiſh Ponds.* § 12.

The property of fiſh in ponds and other incloſed waters is protected both at common law and by ſeveral ſtatutes in the manner already ſhewn. The following proviſion of the Black Act was made with a view to protect the owner of this ſpecies of property from the malicious reſentment of others, who were diſpoſed not ſo much to benefit themſelves by ſtealing the property, as to injure him by the deſtruction of it. Wherefore it is enacted, that " if any perſon or " perſons" (whether armed or diſguiſed or not) " after the " 1ſt of June 1723 ſhall unlawfully and maliciouſly break " down the head or mound of any fiſh pond, whereby the " fiſh ſhall be loſt or deſtroyed; or ſhall forcibly reſcue any " perſon being lawfully in cuſtody of any officer or other " perſon for any ſuch offence; or if any perſon or perſons " ſhall by gift or promiſe of money or other reward procure " any of the King's ſubjects to join him or them in any " ſuch unlawful act; every perſon ſo offending, being " thereof lawfully convicted, ſhall be adjudged guilty of " felony without benefit of clergy." *Fiſh ponds.* Ante, ſ. 10. tit. *Larceny, &c.* 9 Geo. 1. c. 22. made perpetual by ſt. 31 Geo. 2. c. 42. *Breaking down the head or mound of any fiſh pond a capital felony.*

Clergy is alſo ouſted from offenders not ſurrendering themſelves upon proclamation; and from ſuch as conceal, aid, abet, or ſuccour them after the time expired for their ſurrender. *Vide* tit. *Proceſs to bring in the party.*

By

Ch. XXII. § 12. *Fiſh ponds.*

By ſ. 14. the offender may be tried in any county in England at the option of the proſecutor.

Trial, vide ante. 1057.

This ſtatute has in part ſuperſeded the uſe of the ſtat. 37 H. 8. c. 6. ſ. 4. by which it was enacted, "That if any "perſon or perſons maliciouſly, wilfully, and unlawfully "cut or cauſe to be cut out of the head or heads, dam or "dams of any ponds, pools, motes, ſtews, or other ſeveral "waters, or the head or heads, pipe or pipes, of any con- "duit or conduits of any other perſon or perſons; every "ſuch offender ſhall not only forfeit unto the party grieved "treble damages, to be recovered by action of treſpaſs, but "ſhall alſo forfeit to the King for every ſuch offence 10l. "in name of a fine." The act muſt be done from malice to the owner as it ſeems from the preamble before ſtated.

37 H. 8. c. 6. *Cutting heads or dams of ponds, &c. or other ſeveral waters; or heads or pipes of conduits.*

Ante, 1063.

Alſo the ſtat. 5 Eliz. c. 21. reciting that perſons had made ponds, &c. and ſtored the ſame with fiſh, &c. and that the ſaid ſeveral waters, grounds, &c. had not only by night been broken and entered into, "but alſo the heads "or dams of the ſaid ponds, &c. or ſeveral waters have "been maliciouſly, wilfully, and unlawfully cut out, and "the fiſh taken, deſtroyed, carried away, and *ſtolen*, to the "great loſs and damage of the owners, and the encourage- "ment of the offenders, &c.;" for remedy thereof enacts, "That if any perſon or perſons ſhall by day or night un- "lawfully, without authority, break, cut down, cut out, or "deſtroy, any head or heads, dam or dams, of any ponds, "pools, motes, ſtagnes, ſtews, or ſeveral pits, wherein fiſh "are or ſhall happen to be put in or ſtored withal, by the "owners or poſſeſſioners thereof, or do or ſhall wrongfully "fiſh in any of the ſaid ſeveral ponds, &c. to the intent to "deſtroy, kill, take, or ſteal away any of the ſame fiſh, "againſt the will of the owners or poſſeſſioners of the ſame, "not having any lawful title or authority ſo to do; and "thereof be lawfully convicted at the ſuit of the Queen, "&c. or the party grieved; he or they ſhall ſuffer impriſon- "ment for three months, and pay the party grieved treble "damages; and after the ſaid three months expired ſhall "find ſureties for good behaviour for ſeven years after, or "elſe remain in priſon till ſuch ſureties be found for the "ſaid ſeven years." By ſ. 6. the juſtices of oyer and ter- miner and of aſſize in their circuits, and juſtices of the peace and

5 Eliz. c. 21. *Breaking, &c. heads or dams of ponds, &c. to ſteal fiſh, impriſonment for three months and treble damages.*

and gaol delivery in their ſeſſions, have authority to hear and determine the ſame. And by ſ. 8. the ſaid juſtices may on the confeſſion of the offence by the party, and his ſatisfying the party grieved, releaſe the party and his ſureties from their recognizance, &c.

Ch. XXII. § 12. *Fiſh ponds.*

Roſs's caſe, Leiceſter Sp. Aſſ. 1800, cor. Chambre B. MS. Jud. *The breaking down the head or mound of a fiſh pond with a view of letting the water out, in order more effectually to ſteal the fiſh, is not an offence within the ſtat.* 9 Geo. 1. c. 22. *which makes the unlawfully and maliciouſly breaking down ſuch head, &c. whereby the fiſh ſhall be loſt or deſtroyed, a capital felony.*

Thomas Roſs was indicted on the ſtat. 9 Geo. 1. c. 22. for unlawfully, maliciouſly, and felonioufly breaking down the head and mound of two fiſh ponds, in a place called Boſworth Park, belonging to Sir Wolſton Dixie, Bart. *whereby the fiſh therein were loſt and deſtroyed.* It was proved that a part of the head or mound of one of the ponds had been cut down to a conſiderable depth by two perſons, of whom the priſoner was one, ſo as to leave but little water in the pond, and that the fiſh were gone. But it appeared to have been the object of the offenders to *ſteal* the fiſh, and not to let them eſcape through the breach in the mound. For the weeds were much trodden down in the pond, manifeſtly in ſearching for the fiſh; and the two perſons had been ſeen with ſacks, which there was evidence ſufficient to prove were filled with fiſh; and there was no evidence to ſhew that any of the fiſh had eſcaped through the cut, or that it was the occaſion of their loſs or deſtruction any otherwiſe than by rendering it more eaſy to take them when the greateſt part of the water was let off. Chambre B. at the firſt was inclined to think, that though the priſoner might have been indicted for a miſdemeanor under the ſtat. 5 Geo. 3. c. 14., the caſe proved did not ſupport the indictment for the felony, conceiving that the ſtat. 9 Geo. 1. was meant to apply only to caſes of malicious miſchief, and when the breaking of the mound was the immediate cauſe of the loſs and deſtruction of the fiſh, and not merely auxiliary to the deſtruction of them by other means: but not recollecting any caſe upon the conſtruction of this clauſe, he left the evidence of the facts to the jury, who found the priſoner guilty; and he reſpited judgment in order to take the opinion of the Judges upon the queſtion of law. In Trin. term 1800 the Judges on conference held the conviction wrong, as the clauſe againſt breaking the heads, &c. of ponds does not extend to caſes where the object of the party was to ſteal the fiſh; which is guarded againſt by another clauſe. And that even if the offence proved had been originally within

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within the Black Act, it was virtually taken out of it by the ſubſequent ſtatute of the 5 Geo. 3. c. 14.

Vide ante, 611.

Perhaps the abovementioned ſtatute of the 5 Eliz. which was not adverted to upon that occaſion, may alſo be thought to meet the caſe ſo far as concerns the act of cutting the dam with intent to ſteal the fiſh.

§ 13.

8. *Cutting Hop-binds.*

Maliciouſly cutting hop binds in plantations. 6 Geo. 2. c. 37. ſ. 6. *This, as well as the Black Act,* 9 Geo. 1. c. 22. *is made perpetual by ſt.* 31 Geo. 2. c. 42. ſ. 2 & 4. 10 Geo. 2. c. 32. *extending other proviſions of the Black Act to this.*

By ſtat. 6 Geo. 2. c. 37. ſ. 6. "If any perſon or perſons "after the 24th of June 1733 ſhall (during the continu- "ance of the ſtat. 9 Geo. 1. c. 22.) unlawfully and mali- "ciouſly cut any hop-binds growing on poles in any planta- "tion of hops; every perſon or perſons ſo offending, being "thereof lawfully convicted, ſhall be adjudged guilty of "felony, without benefit of clergy." And by ſtat. 10 Geo. 2. c. 32. ſ. 4. "all the proviſions made in the ſtat. 9 Geo. "1. c. 22. for the more ſpeedy and eaſy bringing the of- "fenders againſt the ſaid act to juſtice, and the perſons "who ſhall conceal, aid, abet, or ſuccour ſuch offenders, "and for making ſatisfaction and amends to all and every "the perſon and perſons, their executors and adminiſtra- "tors, for the damages they ſhall have ſuſtained or ſuffered "by any offender or offenders againſt the ſaid act, and for "the encouragement of perſons to apprehend and ſecure "ſuch offender and offenders, and for the better and more "impartial trial of any indictment or information which "ſhall be found, commenced, or proſecuted for any of the "offences committed againſt the ſaid act; together with "all reſtrictions, limitations, and mitigations by the ſaid act "directed; ſhall during the continuance of the ſaid act "extend to, and be of force and effect in all caſes of "offences committed by unlawfully and maliciouſly cutting "any hop-binds growing on poles in any plantation of "hops."

§ 14.

9. *Obſtructing the Paſſage of Grain.*

36 Geo. 3. c. 9. ſ. 1. *Vide* ante, 425. *Uſing violence to any perſon to deter him from buying grain;*

By ſtat. 36 Geo. 3. c. 9. intitled, "An act to prevent "obſtructions to the free paſſage of grain within the king- "dom," it is enacted, "that if any perſon or perſons "(after

" (after the 18th of December 1795) ſhall wilfully and maliciouſly beat, wound, or uſe any other violence to or upon any perſon or perſons, with intent to deter or hinder him or them from buying of corn or grain in any market or other place within this kingdom; or ſhall unlawfully ſtop or ſeize any wheat (*a*), flour, meal, malt, or other grain, in or on the way to or from any city, market town, or place in this kingdom; or ſhall wilfully and maliciouſly break, cut, or deſtroy any waggon, cart, or other carriage wherein any ſuch wheat, &c. or other grain ſhall be loaded, or the harneſs of any horſe or horſes drawing or carrying the ſame; or ſhall unlawfully take off from any ſuch carriage, or drive away, kill, or wound any ſuch horſe or horſes; or unlawfully beat or wound the driver or drivers of any ſuch waggon, cart, or other carriage, or horſe, ſo loaded; with intent to ſtop ſuch wheat, &c. or other grain; or ſhall by cutting of the ſacks, or otherwiſe, ſcatter or throw abroad any ſuch wheat, &c.; or ſhall take or carry away, deſtroy, ſpoil, or damage the ſame, or any part thereof; every and all ſuch perſon or perſons, being thereof lawfully convicted before any two or more juſtices of the peace of the county, &c. wherein ſuch offence or offences ſhall be committed, or before the juſtices of the peace in open Seſſions (who are authoriſed ſummarily and finally to hear and determine the ſame), ſhall be ſent to the common gaol or houſe of correction, there to continue and be kept to hard labour for any time not exceeding three months nor leſs than one."

Ch. XXII. § 14. *Grain, flour, &c.*

or ſtopping grain, &c. in its paſſage;

or breaking &c. cutting, &c. carriage or harneſs of horſes conveying it;

or taking off from carriage or injuring, &c. horſes;

or beating driver;

with intent to ſtop ſuch grain;

or cutting ſacks, or otherwiſe ſcattering ſuch grain;

imprisonment on ſummary conviction before juſtices of peace.

By ſ. 2. " If any ſuch perſon or perſons ſo convicted ſhall commit any of the offences aforeſaid a ſecond time; or if (after the 18th December 1795) any perſon or perſons, with intent to prevent or hinder any corn, meal, flour, malt, or grain from being lawfully carried or removed from any place whatſoever, ſhall wilfully and

2d offence felony.

(*a*) The words of the prior ſtatute of the 11 Geo. 2. c. 22. ſ. 1. are, " or ſhall ſtop or ſeize upon any waggon, cart, or other carriage, or horſe, loaded with wheat, &c. in or on the way to or from any city, market town, or ſeaport of this kingdom, and wilfully and maliciouſly break, cut, ſeparate, or deſtroy the ſame, or any part thereof, or the harneſs of the horſes drawing the ſame; or ſhall unlawfully take off, drive away, kill, or wound any of ſuch horſes," &c.

" maliciouſly

Ch. XXII. § 14. *Grain, flour, &c.*

" maliciouſly pull, throw down, or otherwiſe deſtroy, any " ſtorehouſe, or granary, or other place in which corn (*a*), " meal, flour, malt, or grain ſhall be then kept, or ſhall un- " lawfully enter any ſuch ſtorehouſe, granary, or other " place, and take and carry away, any corn, flour, meal, " malt, or grain therefrom; or ſhall throw abroad or ſpoil " the ſame, or any part thereof; or ſhall unlawfully enter " on board any ſhip, barge, boat, or veſſel, and wilfully and " maliciouſly take and carry away, caſt or throw out there- " from, or otherwiſe ſpoil or damage any corn, flour, meal, " malt, or grain therein (*b*); every perſon ſo offending and " being thereof lawfully convicted ſhall be adjudged guilty " of felony, and tranſported for 7 years, in like manner as " other felons are directed to be, &c. And if any ſuch " offender ſo tranſported ſhall return into this kingdom be- " fore the expiration of the ſaid 7 years, he or ſhe ſhall " ſuffer death as a felon without benefit of clergy." Saving corruption of blood and loſs of dower.

Deſtroying granary, &c. or taking grain, &c. therefrom; or ſpoiling the ſame, felony.

Vide ante, 426.

The ſtat. 11 Geo. 2. c. 22. ſtill in force, which was levelled againſt offences of this deſcription committed, as the title of the act ſtates, " with intent to hinder the exporta- " tion of corn," has the ſame proviſions, with the variations noticed below in the margin; and with this further addition, that for the offences created by the firſt clauſe of that ſtatute the juſtices are alſo directed to adjudge the offender to be publicly whipped at the time and place before ſpecified.

By both acts a conditional remedy is given againſt the hundred.

§ 15.

X. *Againſt Cattle.*

Cattle. 37 Hen. 8. c. 6. § 4.

So far back as the reign of Henry VIII. a ſtatute paſſed, whereby it was enacted, " that if any perſon or perſons " maliciouſly, unlawfully, and willingly cut out, or cauſe to " be cut out, the tongue of any tame beaſt of any other per- " ſon or perſons, the ſaid beaſt then being in life; every ſuch " offender ſhould not only forfeit to the party grieved treble

(*a*) The words of the ſtat. 11 Geo. 2. here are, " where corn ſhall be then " kept *in order to be exported*, or ſhall unlawfully enter," &c.

(*b*) The ſame here adds, " intended for exportation."

" damages

" damages for ſuch offence, to be recovered by action of " treſpaſs, but ſhould alſo forfeit to the King for every ſuch " offence 10l. in name of fine." The preamble ſeems to point, as I have remarked in another place, at ſuch acts done out of malice to the owner.

Ante, 1063.

Then the ſtat. 22 & 23 Car. 2. c. 7. reciting that " whereas divers evil-diſpoſed perſons, *intending the ruin* " *and impoveriſhment of their fellow ſubjects*, have deviſed " and of late ſecretly in the night-time, and at other times " when they think their deeds are not known, frequently " practiſed in ſeveral parts of this kingdom unlawful and " wicked courſes in burning of ricks, &c. and cutting, " maiming, wounding, and killing of horſes, ſheep, beaſts, " and *other cattle*, &c.; *for prevention thereof* enacts, (ſ. 2.) " that if any perſon or perſons ſhall *in the night-time* mali- " ciouſly, unlawfully, and willingly, kill or deſtroy any " horſes, ſheep, or *other cattle*, of any perſon or perſons " whatſoever; every ſuch offence ſhall be adjudged felo- " ny, and the offenders and every of them ſhall ſuffer as " in caſe of felony. And (by ſ. 4.) it is further enacted " and declared, that in caſe any perſon or perſons who " ſhall be convict or attainted of any the offences, &c. " aforeſaid, (to avoid judgment of death or execution " thereupon for ſuch his offence,) ſhall make his election " to be tranſported beyond ſeas to any of his Majeſty's " plantations, that then the juſtices of aſſize, oyer and " terminer, gaol delivery, or juſtices of the peace, before " whom ſuch offender ſhall be convict or attaint by virtue " of this act, and every of them reſpectively, ſhall cauſe " judgment to be entered againſt every ſuch offender, that " he be tranſported beyond the ſeas to ſome of his Ma- " jeſty's plantations, in the ſaid judgment to be particularly " mentioned and expreſſed, there to remain for 7 years." " And if any ſuch offender ſhall return into this kingdom " before the expiration of the ſaid 7 years, he ſhall ſuffer " death as a felon, and as if no ſuch election to be tranſ- " ported had been made by him."

22 & 23 Car. 2. c. 7.

Killing horſes, ſheep, or other cattle in the night, felony and death, tranſmutable for tranſportation.

But by ſ. 5. " If any perſon or perſons ſhall in the night- " time maliciouſly, unlawfully, and willingly maim, wound, " or otherwiſe hurt any horſes, ſheep, or other cattle, " *whereby the ſame ſhall not be killed or utterly deſtroyed*; then

" every

Ch. XXII § 15. *Cattle.*

"every ſuch offender ſhall forfeit to the party grieved "treble the damage which he ſhall thereby ſuſtain, to be "recovered by action of treſpaſs or upon the caſe.

Offences within this act muſt by ſ. 7. "be proceeded "againſt within 6 months after the offence committed."

9 Geo. 1. c. 22. ſ. 1.; made perpetual by 31 Geo. 2. c. 42. ſ. 2. *Maliciouſly killing, wounding, or maiming any cattle, a capital felony.*

Laſtly, by the Black Act "If any perſon or perſons (whe-"ther armed or diſguiſed or not) after the 1ſt of *June* "1723, ſhall unlawfully and maliciouſly kill, maim, *or* "wound *any cattle;* or ſhall forcibly reſcue any perſon, "being lawfully in cuſtody of any officer or other perſon "for any the offences before mentioned; or if any perſon "or perſons ſhall by gift or promiſe of money or other "reward procure any of his Majeſty's ſubjects to join him "or them in any ſuch unlawful act; every perſon ſo of-"fending, being lawfully convicted thereof, ſhall be ad-"judged guilty of felony without benefit of clergy."

Vide tit. *Proceſs againſt the party.*

Offenders not ſurrendering themſelves purſuant to an order of the King in council are alſo ouſted of clergy by ſ. 4. as well as thoſe who, "after the time appointed as "aforeſaid for the ſurrender of any perſon ſo charged upon "oath with any the offences aforeſaid be expired, conceal, "aid, abet, or ſuccour ſuch perſon, knowing him to have "been ſo charged as aforeſaid, and to have been required "to ſurrender himſelf by ſuch order or orders as aforeſaid, "being lawfully convicted thereof," &c.

Trial. Ante, 1057.

The trial may, by ſ. 14., be in any county in *England.*

Aiders and abettors. Midwinter and Sym's caſe, Glouceſter Sp. Aſſizes 1779, Foſt. 415. and poſt, ſ. 19.

Aiders and abettors at the fact, who are principals at common law, are holden to be ouſted of clergy under the ſtat. 9 Geo. 1.

§ 16. *Malice againſt the owner.*

It is clearly ſettled, that in order to bring an offender within this law the malice muſt be directed againſt the owner of the cattle, and not merely againſt the animal itſelf.

Pearce's caſe, Glouceſter Sum. Aſſ. 1789, cor. Heath J. 2 Leach, 594. *Malice againſt the animal not within the Black Act.*

Charles Pearce was indicted on the ſtat. 9 Geo. 1. for "feloniouſly, unlawfully, wilfully, and malicious maiming "and wounding a cow" of the proſecutor's. It appeared that his intent was to commit beſtiality with the animal, and that he had in a paſſion run a ſharp pointed ſtick quite through her body becauſe ſhe would not ſtand quiet. Heath J. directed the priſoner to be acquitted on this charge; it being

being neceſſary to ſhew that the fact was committed from ſome *malicious motive towards the owner*, and not merely from an angry and paſſionate diſpoſition towards the beaſt itſelf, *without any intention of thereby injuring the owner.* Ch. XXII § 16. *Cattle.*

The ſame point was ruled in the caſe of one John Kean, by the ſame learned Judge, where the fact of killing appeared to have been done in a moment of paſſion againſt the animal. Kean's caſe, O. B. 1789, 2 Leach, 595. 609.

And again in John Shepherd's caſe, upon a ſimilar indictment tried at the O. B. before Hotham B. and Heath J. the evidence was, that the priſoner, who was ſervant to the proſecutor, had ſolicited him earneſtly to let him have another of the horſes called Boxer, inſtead of the one which was afterwards maimed, and which at the time the miſchief was done was employed under the direction of the priſoner, in carrying dung in the team. His requeſt was not complied with; and he was afterwards ſeen holding the horſe by the tongue with one hand while he beat him violently over the head with the butt end of a whip which he held in the other: and afterwards the animal was found lying in a meadow with its tongue hanging quite out of its mouth, and one part of it, which was quite dead, was nearly ſevered from the other. But there was no other evidence that the priſoner had any malice againſt his maſter, except only, that on being remonſtrated with on the barbarity of his conduct, he had declared in the heat of his paſſion, that he would do the other horſe an injury if his maſter did not let him have Boxer to go in the team; neither did the immediate cauſe of his reſentment againſt the animal appear. It was left to the jury to conſider whether the priſoner's conduct had been actuated by any motives of perſonal revenge againſt his maſter, or had proceeded from ſome ſudden paſſion againſt the animal itſelf; for unleſs they were of opinion that it was done from a malicious motive againſt the owner, however brutal his conduct was, he did not come within the meaning of the act. The priſoner was thereupon acquitted. Shepherd's caſe, O. B Oct. 1790, 2 Leach, 609. *Proof of diſlike by a ſervant to a particular horſe, and the fact committed after the maſter's refuſal to let him have another, not ſufficient to bring the caſe within the Black Act; though the priſoner had before threatened the injury if his maſter would not let him have the other horſe.*

There was another caſe ſome years ago, the name of which I have not been able to learn, ſaid to have been decided by Mr. Juſtice Heath, where it appeared that the priſoner had cut the tendons of the hinder legs of ſeveral *Maiming ſheep becauſe they overleapt their bounds, not within the act.* Ex relatione.

Ch. XXII. § 16. *Cattle.*

ſheep that had from time to time broke over into his incloſure; which was holden not to be a caſe within the ſtatute.

In all theſe caſes there was reaſonable evidence appearing upon the face of the tranſaction itſelf to impute the motive of the fact to reſentment againſt the particular animals, and not to any perſonal malice againſt the owner. But it does not appear to have been decided that it is neceſſary to give expreſs evidence of previous malice againſt the owner, in order to bring a caſe within the act: but the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it ſeems a queſtion ſolely for the conſideration of the jury to attribute the real motive to it: to which the tranſaction itſelf will moſt probably furniſh a clue. And in Daniel Ranger's caſe, although that point was not directly in judgment, the Judges agreed in the debate that it was not neceſſary in theſe caſes for the proſecutor to prove a previous exiſting malice againſt the owner.

Ranger's caſe, Surry Sum. Aſſ. 1798, cor. Buller J. MS. Buller J. and Ms. Jud.

§ 17. *No indictment lies at common law for unlawfully with force and arms maiming a horſe.*

The laſt-mentioned caſe was an indictment at common law, which charged that the priſoner "on 23d of May, 33 Geo. 3. with force and arms, at, &c. one black gelding of the value of 30 l. of the goods and chattels of William Collyer, then and there being, then and there unlawfully did maim, to the great damage of Collyer, and againſt the peace," &c. But upon reference to the Judges after conviction, they all held that the indictment contained no indictable offence; for if the caſe were not within the Black Act, the fact in itſelf was only a treſpaſs: for that the words *vi et armis* did not imply force ſufficient to ſupport an indictment.

§ 18. *Cattle.*

As to what ſhall be deemed *cattle* within the Black Act:

Paty's caſe, Abingdon Sum. Aſſ. 1770, cor. Blackſtone J. 2 Blac Rep. 721. *The 9 Geo. 1. c. 22. was deſigned to extend and not abridge the offences deſcribed in 22 & 23 Car. 2. c. 7.*

John Paty was tried and convicted on an indictment framed on the ſtat. 9 Geo. 1. c. 22. for feloniouſly, unlawfully, knowingly, wilfully, and maliciouſly ſhooting and killing one mare, of a mixed red and white colour, and one brown ſtone colt, the goods and chattels of Matthew Batten. The words of the ſtatute are, "That if any perſon ſhall "unlawfully and maliciouſly kill, &c. any *cattle*, he ſhall "ſuffer death without benefit of clergy." It was moved in arreſt

arreſt of judgment, 1ſt, That the mare and colt were not averred in the indictment to be *cattle* within the meaning of the act. 2dly, That the word *cattle* does not neceſſarily include *horſes, mares, and colts.* To ſupport theſe objections it was argued, that the Legiſlature in the ſtatutes of 3 & 4 Ed. 6. c. 19. 5 & 6 Ed. 6. c. 14. and 31 Geo. 2. c. 40. for regulating the ſale of *cattle*, has thought it neceſſary to mention by name the ſeveral ſpecies of beaſts to which the proviſions of thoſe acts were deſigned to extend. That the book of rates (12 Car. 2. c. 4.) diſtinguiſhes between the ſubſidy to be paid on *great cattle* imported, viz. 50 ſhillings, and that on *horſes and mares*, viz. 10l. That the ſtat. 22 Car. 2. c. 13. diſtinguiſhes between the encouragements given for breeding *cattle of all ſorts*, and for breeding *horſes;* and that when the ſtat. 14 Geo. 2. c. 6. made it felony without clergy to ſteal ſheep or other cattle, it was found neceſſary to ſpecify by ſtat. 15 Geo. 2. c. 34. what cattle were intended by the act, among which neither *horſes, mares, or colts* are included (*a*). On the firſt day of Michaelmas term 1770 this caſe was ſubmitted to the Judges at Serjeants'-Inn; and they unanimouſly agreed, That as the ſtat. of 22 & 23 Car. 2. c. 7. had made the offence of killing horſes by night a ſingle felony, this ſtat. of 9 Geo. 1. c. 22. was only to be conſidered as an extenſion of that act; and ſome precedents of capital convictions were cited upon this branch of the ſtatute, though none of executions. It was therefore agreed that judgment of death ſhould be given againſt the priſoner at the next aſſizes; but he was then reprieved for tranſportation; and afterwards, (upon ſtrong application from the country,) received a free pardon.

and therefore horſes, mares, and colts are included in the word cattle.

Vide ante, 616.

In Robert Mott's caſe, who was convicted for wounding a gelding, a ſimilar objection in arreſt of judgment was over-ruled by Mr. Baron Hotham upon the authority of the above caſe.

Mott's caſe, O. B Sep. 1783, 1 Leach, 83. n.

(*a*) The argument derived in the above caſe from the ſtats 14 & 15 Geo. 2. on behalf of the priſoner will be found to loſe much of its force by adverting to the preamble of the firſt of thoſe ſtatutes: from whence it appears that one principal object of the law was to guard againſt an artful practice of ſheep ſtealers, and ſtealers of other cattle for food, whoſe principal object being the carcaſe, they ſtripped the animals which they killed on the ſpot, and left their ſkins there for fear of detection. This of courſe is quite foreign to the intention and purpoſe of horſe-ſtealers.

Ch. XXII. § 18. *Cattle.*

The ſame point was ruled in Moyle's caſe, who was convicted of killing a mare.

Moyle's caſe, Bodmin Sum. Aſſ. 1791, cor. Buller J.

It is plain that the Legiſlature muſt have intended to include *horſes* in the word "*cattle*," when in the ſtat. of Car. 2. they ſpeak of "horſes, ſheep, or *other cattle*:" and by the ſtatute of George the firſt they exclude from clergy ſuch as kill, &c. *any cattle*: which latter ſtatute was evidently intended to enlarge and not to reſtrain the deſcription of the felony; for it extends to ſuch as "maim or wound" any cattle, though not deſtroyed, which by the prior act was left a miſdemeanor at moſt, puniſhable only by action to recover treble damages.

§ 19. *Aiders and abettors.*

In the caſe of Midwinter and Sims, who were indicted and convicted on the Black Act for killing a mare of Mr. Dutton's, the verdict was approved by all the Judges as to the principal offender; though Mr. Juſtice Foſter diſſented from the reſt as to the propriety of ouſting Sims of his clergy, who was no more than an aider and abettor at the fact. The circumſtances there were, that the priſoners, having conceived a prejudice againſt the proſecutor on account of a proſecution which he was then carrying on againſt them for ſtealing rabbits, agreed to take their revenge on him, and to kill one of his breeding mares that night; which they executed accordingly: Midwinter with the aſſiſtance of the other having caught the mare, buckled his own girdle about her neck, and faſtened a girdle of Sims' to his own: and Sims, having taken hold of the girdle fixed in this manner to the mare's neck, held it faſt in order to prevent the mare getting away, while Midwinter with a large ſharp hook gave the mare a deep wound in the belly, of which ſhe died the ſame night.

Midwinter and Sims' caſe, Glouceſter Sp. Aſſ. 1779, Foſt. 415. Appx. laſt edition. *Aiders and abettors at the fact of killing a mare of another from malice to the owner are ouſted of clergy by the ſt. 9 G. 1. c. 22. as well as the principal, who gave the mortal blow.*

§ 20.

As to the extent of the injury received by the animal; if the maim or wound were not mortal, the caſe did not amount to felony within the ſtat. of Car. 2.; but that is otherwiſe within the act of Geo. 1.

Haywood's caſe, Coventry Sum. Aſſ 1801, cor. Rooke J. MS. Jud. *Wounding a horſe cut of malice to the owner by driving a nail into the frog of his hoof, is within the Black Act, 9 Geo. 1. c. 22. though the injury were only temporary.*

John Haywood was tried on an indictment on the Black Act, containing two counts, one for maliciouſly maiming, the other for maliciouſly wounding a gelding, againſt the ſtatute. It was proved, that on the 10th of June the priſoner

ſoner had maliciouſly and with an intent to injure the proſecutor driven a nail into the frog of the horſe's foot; and the horſe was thereby rendered uſeleſs to the owner, and continued ſo at the time of the trial (1ſt Auguſt): but the proſecutor ſaid he was likely to do well, and to be perfectly ſound again in a ſhort time. After conviction, judgment was reſpited upon a doubt, whether as the horſe was likely to recover, and as the wound was not a permanent injury, the offence were within the ſtatute? In Michaelmas term 1801 all the Judges held the conviction right. The words of the ſtat. 9 Geo. 1. c. 22. are, "ſhall unlawfully and "maliciouſly kill, maim, OR *wound* any cattle," &c.; which word *wound* appears to be uſed as contradiſtinguiſhed from a permanent injury, ſuch as maiming.

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11. *Manufactures.* § 21.

The proviſions made by ſtatute for the protection of manufactures from depredation, as well as the perſons of maſter manufacturers from unlawful violence, having been before mentioned, I now proceed to conſider another ſort of protection by which this ſpecies of property is guarded.

Ante, tit. *Larceny*, p. 618 &c. and tit. *Aſſaults*, &c. 426.

Woollens.

By the ſtat. 22 Geo. 3. c. 40. ſ. 2. "If any perſon or "perſons ſhall by day or by night break into any houſe or "ſhop, or enter by force into any houſe or ſhop, with in-"tent to cut or deſtroy any ſerge, or other woollen goods "in the loom, or any tools employed in the making there-"of; or ſhall wilfully and maliciouſly cut or deſtroy any ſuch "ſerges or woollen goods in the loom, or on the rack, or ſhall "burn, cut, or deſtroy any rack on which any ſuch ſerges or "other woollen goods are hanged in order to dry; or ſhall "wilfully and maliciouſly break or deſtroy any tools uſed in "the making any ſuch ſerges or other woollen goods, not hav-"ing the conſent of the owner ſo to do; every ſuch offender "being thereof lawfully convicted ſhall be guilty of felony "without benefit of clergy."

22 Geo. 3. c. 40. ſ. 2. this repeals a ſimilar proviſion in ſtat. 12 Geo. 1. c. 34. ſ 7.

Breaking into houſe, &c with intent to cut or deſtroy woollens in the loom, or rack, or tools, or cutting, &c ſuch, a capital felony.

§ 22. *Silk.*

The ſame ſtatute, ſ. 2. enacts, "that if any perſon or "perſons ſhall by day or by night break into any houſe or "ſhop, or enter by force into any houſe or ſhop, with intent "to cut or deſtroy any velvet, wrought ſilk, or ſilk mixed

Ch. XXII. § 22. *Manufactures.*

" with any other materials, or other ſilk manufacture in the " loom, or any warp or ſhute, tools, tackle, or utenſils; or " ſhall wilfully and maliciouſly cut or deſtroy any velvet, " wrought ſilk, or ſilk mixed with any other materials, or " other ſilk manufacture in the loom, or any warp or ſhute, " tools, &c. prepared or employed in or for the making " thereof; or ſhall wilfully and maliciouſly break or deſtroy " any tools, tackle, or utenſils uſed in or for the weaving or " making of any ſuch velvet, &c. or other ſilk goods or ſilk " manufacture; not having the conſent of the owner ſo to " do; every ſuch offender, being thereof lawfully convicted, " ſhall be guilty of felony, without benefit of clergy."

§ 23. *Linen or cotton.*

Alſo by ſ. 3. it is enacted, " that if any perſon or perſons " ſhall by day or by night break into any houſe or ſhop, or " enter by force into any houſe or ſhop with intent to cut " and (*a*) deſtroy any linen or cotton, or linen and cotton " mixed with any other materials, or other linen or cotton " manufactures in the loom, or any warp, or ſhute, tools, " tackle, and utenſils; or ſhall wilfully and maliciouſly cut or " deſtroy any linen or cotton, or linen or cotton mixed with " any other materials, or other linen and cotton manufacture " in the loom, or any warp, or ſhute, tools, tackle, and " utenſils prepared for or employed in the making thereof; " or ſhall wilfully and maliciouſly break and deſtroy any " tools, tackle, or utenſils uſed in or for the carding, ſpin- " ning, weaving, preparing, or making, in any way what- " ever, any ſuch linen or cotton, or linen or cotton mixed " with any other materials, or other linen and cotton goods, " or linen and cotton manufactures whatſoever; not having " the conſent of the owner ſo to do; every ſuch offender, " being thereof lawfully convicted, ſhall be guilty of felony " without benefit of clergy."

(*a*) The word *or* is uſed in the prior ſection, and poſt.

Vide the title of the act.

This act repeals ſo much of the ſtat. 12 Geo. 1. c. 34. and of the ſtat. 6 Geo. 3. c. 28. " as relates to the puniſh- " ment of perſons deſtroying any woollen or ſilk manufac- " tures, or any implements prepared for or uſed therein;" and the clauſes of the former act ſo repealed which are re-cited in this ſtatute are verbatim the ſame. But it does not profeſs to repeal the following ſtature, which contains pro-viſions varying in ſeveral reſpects from the clauſe laſt ſet forth. And Lord Hale informs us, that a ſecond ſtatute

1 Hale, 705.

enact-

enacting the ſame offence to be felony that was ſo enacted before, with ſome alterations, is but cumulative, and no repeal of the former act: which muſt doubtleſs be underſtood with this reſerve, that the two proviſions may well ſtand together without clathing or inconſiſtency.

By ſtat. 4 Geo. 3. c. 37. ſ. 16. "If any perſon or perſons "ſhall by day or night break into any houſe, ſhop, cellar, "vault, or other place or building, or by force enter into "any houſe, &c. or other place or building, with intent "to ſteal, cut, or deſtroy, any linen yarn, or any linen "cloth, or any manufacture of linen yarn, belonging to "any manufactory, or the looms, tools, or implements "uſed therein; or ſhall wilfully or maliciouſly cut in pieces, "or deſtroy, any ſuch goods, either when expoſed to bleach "or dry; every ſuch offender, being thereof lawfully con-"victed, ſhall be judged guilty of felony, without benefit "of clergy." This by ſ. 33. is made a public act.

4 Geo. 3. c. 37. as to ſtealing ſuch, *vide* ante, 620.

By ſtat. 28 Geo. 3. c. 17. ſ. 24. for 21 years from the 7th of May 1798, and to the end of the then next ſeſſion, "If any perſon or perſons ſhall by day or night break into "any houſe, ſhop, cellar, vault, or other place or build-"ing, or by force enter into any houſe, &c. or other place "or building, belonging to the ſaid manufactory (i. e. of "the governor and company of the Britiſh caſt-plate-glaſs "manufactory), or wherein the ſame ſhall be then carry-"ing on, with intent to ſteal, cut (*a*), break, or otherwiſe "deſtroy any glaſs, wrought or unwrought, or any mate-"rials, tools, or implements, uſed in, for, or about the ma-"king thereof, or any goods or wares belonging to the ſaid "manufactory; or ſhall ſteal, or wilfully or maliciouſly cut, "break, or otherwiſe deſtroy any ſuch glaſs, materials, "tools, or implements; every ſuch offender, being lawfully "convicted, ſhall be judged guilty of felony, and tran-"ſported for ſeven years (*b*), or ſhall be adjuged to ſuffer "ſuch leſs puniſhment as the Court before whom ſuch of-"fender or offenders ſhall be tried ſhall think fit to "award."

§ 24. *Plate glaſs.* 28 Geo. 3. c. 17. (This, though a public act, is to be found among the private and local acts.)

(*b*) The following words were not in the firſt ſtatute.

(*a*) The printed ſtat. has here the word *out*, inſtead of *cut*, probably a miſprint, as the word *cut* afterwards is uſed; and the ſtat. 13 Geo. 3. c. 38. ſ. 29. for incorporating the original company, from whence this was probably taken, has the word *cut*.

12. *Highways.*

§ 25. *Vide* general title *Highways and Bridges.*

All nuſances to ſuch are indictable at common law: and by the general highway act, 13 Geo. 3. c. 78. ſ. 42., the damaging of poſts, blocks, and great ſtones ſet up to ſecure cauſeways, and of the banks which ſecure and defend the ſame, and the ſtones, bricks, or wood, fixed on the parapets or battlements of bridges, as alſo the pulling down, deſtroying or defacing of mile ſtones or direction poſts, is made liable on conviction before a juſtice of the peace to a penalty not exceeding 5 *l.*, nor leſs than 10*s.*; and in default of payment the offender is to be committed to the houſe of correction, there to be whipped and kept to hard labour not exceeding one calendar month, nor leſs than ſeven days.

13. *Turnpikes.*

§ 26. *Vide* poſt. ſ. 32.

The ſtat. 7 Geo. 3. c. 40. repealed all former general proviſions relative to turnpikes: this again was repealed (except as to ſo much as repealed the former acts) by the ſtat. 13 Geo. 3. c. 84. ſ. 86. which latter conſolidates all the former proviſions intended to be retained. And

13 Geo. 3. c. 84. *Deſtroying turnpike gates, poſts, rails, &c. or engines for weighing, &c.*

By ſ. 42. of that act, "To prevent the malicious deſtroying of any turnpike gate or houſe which hath been or ſhall hereafter be erected," it is enacted, "that if any perſon or perſons whatſoever ſhall either by day or night wilfully or maliciouſly pull down, pluck up, throw down, level, or otherwiſe deſtroy any turnpike gate, or turnpike gates, or any poſt or poſts, rail or rails, wall or walls, or any chain, bar, or other fence or fences belonging to any turnpike gate, or any other chain, bar, or fence of any kind whatſoever, ſet up or erected, or hereafter to be ſet up or erected, to prevent paſſengers from paſſing by without paying any toll, laid or directed to be paid by any act or acts of parliament made for that purpoſe; or any houſe or houſes erected or to be erected for the uſe of any ſuch turnpike gate or turnpike gates; or any crane, machine, or engine, made or erected, or to be made or erected on any turnpike road by authority of parliament, for weighing waggons, carts, or carriages; or ſhall forcibly reſcue any perſon or perſons, being lawfully in cuſ-

" tody of any officer or other perſon for any of the offences " before-mentioned; every perſon ſo offending in any of " the ſaid caſes, being thereof lawfully convicted, ſhall be " adjudged guilty of felony, and ſhall be tranſported to one " of his Majeſty's plantations abroad for ſeven years, or " ſhall be committed to priſon for any time not exceeding " three years, at the diſcretion of the Judge or Court before " whom ſuch offender ſhall be tried. And any indictment " for ſuch offences may be inquired of, tried and determined " in any adjacent county within that part of *Great Britain* " called *England*, in ſuch manner and form as if the facts " had been there committed."

Ch. XXII. § 26. *Turnpikes.*

Felony and tranſportation or imprisonment for three years.

The ſt. 8 G. 2. c. 20. had made the offence a capital felony.

Trial.

By ſ. 43. the hundred ſhall make ſatisfaction, &c.

14. *Bridges.*

§ 27. *Bridges.*

The malicious deſtruction or damaging of public bridges is no doubt puniſhable as a miſdemeanor at common law, being a nuſance to all the King's ſubjects; and the general highway act of the 13 Geo. 3. c. 78. ſubjects to a penalty of 5l. on ſummary conviction before a juſtice of peace, and in default of payment to whipping, impriſonment, and hard labour, every perſon who ſhall " break, damage, or throw " down the ſtones, bricks, or wood fixed upon the parapets " or battlements of bridges."

In many inſtances the Legiſlature have made the offence of deſtroying or damaging particular bridges felony; and in ſome have ouſted ſuch offenders from the benefit of clergy. It would be endleſs to ſet out theſe acts: ſuch as have fallen under my notice are ſubjoined in a note (*a*).

15. *Mines and Engines.*

§ 28. *Setting fire to coal mines.* 10 Geo. c. 32. ſ. 6.

By ſtat. 10 Geo. 2. c. 32. ſ. 6. " After the 23d of June " 1737 and during the continuance of the ſtat. 9 Geo. 1.

(*a*) London B. 31 Geo. 2. c 20. ſ. 6. Weſtminſter B. 9 G. 2. c. 29. Blackfriars B. 29 Geo. 2. c. 86. Fulham B. 12 Geo. 1. c. 36 ſ. 3. Old Brentford B. 30 Geo. 2. c. 63. ſ. 19. and 31 Geo. 2. c. 48. Hampton Court B. 23 Geo. 2. c. 37. ſ. 12. Walton B. 20 Geo. 2. c. 22. ſ. 3. Ribble B. 24 Geo. 2. c. 36. Sandwich B. 28 Geo. 2. c. 55. Wye B. 29 Geo. 2. c. 73. ſ. 5. Urſe B. 29 Geo. 2. c. 73. J. Ferry's B. 30 Geo. 2. c. 59. and 18 Geo. 3. c. 10. Trent B. 31 Geo. 2. c. 59.

Ch. XXII. § 28. *Mines and engins*

" c. 22." (this is the Black Act, which after ſeveral continuances was together with this act made perpetual by the ſtat. 31 Geo. 2. c. 42.) " if any perſon or perſons ſhall wilfully and maliciouſly ſet on fire or cauſe to be ſet on fire " any mine, pit, or delph of coal or cannel coal; every perſon ſo offending, being thereof lawfully convicted, ſhall be " adjudged guilty of felony, without benefit of clergy."

And by ſ. 4. of the ſame act, " all the proviſions made in " the ſtat. 9 Geo. 1. c. 22. for the more ſpeedy and eaſy " bringing the offenders againſt the ſaid act to juſtice, and " the perſons who ſhall conceal, aid, abet, or ſuccour ſuch " offenders, and for making ſatisfaction and amends to all " and every the perſon and perſons, their executors and adminiſtrators, for the damages they ſhall have ſuſtained or " ſuffered by any offender or offenders againſt the ſaid act, " and for the encouragement of perſons to apprehend and " ſecure ſuch offender and offenders, and for the better and " more impartial trial of any indictment or information " which ſhall be found, commenced or proſecuted for any of " the offences committed againſt the ſaid act, together with " all reſtrictions, limitations, and mitigations by the ſaid act " directed, ſhall during the continuance of the ſaid act extend to and be of force and effect in all caſes of offences " committed by wilfully and maliciouſly ſetting on fire, or " cauſing to be ſet on fire, any mine, pit, or delph of coal or " cannel coal."

13 Geo. 2. c. 21. *Drowning collieries ſubjects party to treble damages in action.*

Then the ſtat. 13 Geo. 2. c. 21. entitled an act " for " *further* and more effectually preventing the wilful and " malicious deſtruction of collieries and coal-works;" reciting that " divers evil-diſpoſed perſons poſſeſſed of or intereſted in collieries, have by ſecret and ſubtil devices " wilfully and maliciouſly attempted to drown adjacent " collieries, and have by means of water conveyed or obſtructed for that purpoſe deſtroyed or damaged the ſame, " *intending* thereby to enhance the price of coals and gain " the monopoly thereof." And then reciting the act of the 10 Geo. 2. c. 32. whereby the wilfully and maliciouſly ſetting on *fire* any ſuch mine, &c. is made a capital felony; " and " whereas it is reaſonable that an adequate puniſhment " ſhould likewiſe be inflicted on perſons who ſhall wilfully " and maliciouſly deſtroy or damage collieries by means of

" *water*

" *water*, as is aforeſaid;" it therefore enacts, " that if any " perſon after the 12th of *June* 1740 ſhall unlawfully, wil- " fully, and *maliciouſly* divert or cauſe to be diverted water " from any river, brook, water courſe, channel, or land " flood, or convey or cauſe to be conveyed water into any " coal-work, mine, pit, or delph of coal, or into any ſub- " terraneous cavities or paſſages, or make or cauſe to be " made any ſubterraneous cavities or paſſages, with deſign " thereby to deſtroy or damage any coal work, &c. belong- " ing to any other perſon or perſons, or ſhall for that pur- " poſe unlawfully and maliciouſly deſtroy or obſtruct any " ſough or ſewer (which has been a ſough or ſewer in com- " mon for 50 years), made for draining any coal work, &c.; " or ſhall attempt or continue any ſuch miſchievous prac- " tice; or ſhall aid or aſſiſt therein in manner aforeſaid; " every ſuch perſon ſhall for every ſuch offence forfeit and " pay to the party aggrieved treble damages and full coſts " of ſuit, to be recovered by action of debt, bill, plaint, or " information, in any of the King's Courts of Record at " *Weſtminſter*:" provided (by ſ. 2.) that the owner of any ſough, &c. may deſtroy, &c. or uſe it as he might before lawfully do.

There ſeems to be an incongruous and unprecedented diſparity in the puniſhments inflicted by the two laſt-mentioned acts, aſſuming the fact of deſtroying the mine in the one caſe *by fire*, and in the other *by water*, to be done *wilfully and maliciouſly*; unleſs it can be ſuppoſed that the legiſlature meant to diſtinguiſh between an act done from mere malice to the owner, and one done lucri cauſâ, as the latter ſtatute plainly imports in the preamble. Yet the diſtinction (ſuppoſing ſome to exiſt,) has ſeldom if ever been carried ſo far in legiſlation as in this inſtance. In ſmall offences it is frequent enough, and not unreaſonable, that thoſe who cannot pay in their purſes ſhould pay in their perſons the penalty of their miſdeeds; but this is confined to temporary and moderate ſuffering, and does not touch life itſelf. This affords a preſumption that the true ground of the diſtinction made by the two acts was in the mean uſed being in its nature more deſtructive, and the damage more extenſive and irreparable in the one caſe of firing than in the other of drowning a mine. For otherwiſe it might be argued

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gued that if the act of firing were proved to have been done by the owner of an adjoining mine merely for the ſake of increaſing his own profit, and not from malice to the perſon of the owner, the caſe would not fall within the ſpirit of the firſt law; though certainly there is nothing in the words to warrant any ſuch diſtinction: and as the ſtatute in queſtion refers to the Black Act, with which it was meant to be incorporated, it ſeems as if the caſe of burning a coal mine was in point of intent to be governed by the ſame conſideration as the caſe of arſon and other burning provided for by that law.

9 Geo. 1. c. 22.

§ 29.

9 Geo. 3. c. 29. *Deſtroying engines for draining mines, felony and tranſportation:*

For the further protection of this and other mining property, the ſtat. 9 Geo. 3. c. 29. ſ. 3. enacts, "that if any "perſon or perſons ſhall at any time after the firſt of *July* "1769 wilfully or maliciouſly ſet fire to, burn, demoliſh, "pull down, or otherwiſe deſtroy, or damage any fire en- "gine or other engine, erected or to be erected for draining "water from collieries or coal mines, or for drawing coals "out of the ſame; or for draining water from any mine of "lead, tin, copper, or other mineral; or any bridge, wag- "gon-way, or trunk, erected or to be erected for conveying "coals from any colliery or coal mine, or ſtaith for depo- "ſiting the ſame; or any bridge or waggon-way erected or "to be erected for conveying lead, tin, copper, or other "mineral, from any ſuch mine; every ſuch perſon being "lawfully convicted of any of the ſaid offences, or of cau- "ſing or procuring the ſame to be done, ſhall be adjudged "guilty of felony, and ſhall be liable to the ſame pains and "penalties as in caſes of felony; and the court before whom "ſuch perſon ſhall be tried ſhall have authority to tranſport "ſuch felon for the term of ſeven years, in like manner as "other felons are directed to be," &c.

or bridge-ways or waggon-ways, &c.

Proſecution within 18 months.

S. 4. provides that no perſon ſhall be proſecuted for any offence by virtue of this act, "unleſs ſuch proſecution be "commenced within 18 months after the offence commit- "ted."

§ 30.

39 & 40 Geo. 3. c. 77. *Pulling down, filling up, &c.*

Again by ſtat. 39 & 40 Geo. 3. c. 77. ſ. 1. entitled "an "act for the ſecurity of collieries and mines, and for the "better regulation of colliers and miners;" reciting that "from

" from the situation of the veins and mines of coal and iron Ch. XXII. § 30. *Mines and engines.*
" stone, they are greatly exposed to the depredations of evil
" disposed persons, and the laws in being are inadequate to
" the protection thereof, enacts, that if any person or per- *air-way or water-way, &c. of any mine, subject to imprisonment:*
" sons shall, after the 1st of *September* 1800, wilfully and
" maliciously pull down, fill up, or begin or attempt to pull
" down or fill up, any air-way, water-way, drain, pit, *so damaging railway, &c.*
" level, or shaft, or damage or destroy any rail-way, tram-
" road, or other road leading to or from, or intended to lead
" to or from any coal or other mine work; or if any per-
" son or persons (not having or bonâ fide claiming a right
" to possess or work the same respectively), shall, after the *Vide* ante, 595.
" said time wilfully and unlawfully cut, dig, raise, take, or
" carry away any coal, culm, or other mineral, from any
" bed, band, vein, or mine, lying and being in any waste,
" open or uninclosed lands; or shall wilfully and unlaw-
" fully enter into any level, pit, or shaft, with an intent to
" dig, cut, raise, take, or carry away therefrom any coal,
" culm, or other mineral; or shall aid, abet, assist, hire, or *Accessaries before and aiders, &c.*
" command any person or persons to commit any such of-
" fence or offences as aforesaid, then and in every such case
" all and every such person or persons shall be deemed and
" adjudged guilty of a misdemeanor, and the court before
" whom any such person or persons shall be tried and con-
" victed shall have authority to cause such person or per-
" sons to be imprisoned for any term not exceeding six
" months."

" Provided by s. 2. this shall not extend to any trespass or *Exception in favour of owners, &c. of adjoining mines.*
" damage done or committed under ground by any owner
" or owners of any adjoining coal, or other mine, in work-
" ing the same, or by any person or persons duly authorized
" and employed in such working as aforesaid."

By s. 9. " No person shall be prosecuted for any offence *Limitation of prosecutions.*
" against this act, unless such prosecution be begun within
" nine calendar months after the offence committed."

The offence of breaking into the black lead mines consti- *Black lead mines.*
tuted by the stat. 25 Geo. 2. c. 10. must be with intent to steal, and was therefore stated in another place. Ante, 594.

16. *Sea*

Ch. XXII. § 31. *Sea and river banks.*

16. *Sea Banks and Banks of Rivers.*

§ 31. 6 Geo. 2. c. 37.

By the ſtat. 6 Geo. 2. c. 37. ſ. 5. "If any perſon or perſons, after the 24th of *June* 1733, and during the continuance of the ſtat. 9 Geo. 1. c. 22. ſhall unlawfully and maliciouſly break down, or cut down, the bank or banks of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged; every perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of felony without benefit of clergy."

This act and that of the 9 Geo. 1. c. 22. were made perpetual by ſtat. 31 Geo. 2. c. 42.

10 Geo. 2. c. 32. *Extending proviſions of the Black Act to theſe offences.*

The ſtat. 10 Geo. 2. c. 32. ſ. 4. further enacts, "That all the proviſions made in the act of the 9 Geo. 1. c. 22. for the more ſpeedy and eaſy bringing the offenders againſt the ſaid act to juſtice, and the perſons who ſhall conceal, aid, abet, or ſuccour ſuch offenders, and for making ſatisfaction and amends to all and every the perſon and perſons, their executors and adminiſtrators, for the damages they ſhall have ſuſtained or ſuffered by any offender or offenders againſt the ſaid act, and for the encouragement of perſons to apprehend and ſecure ſuch offender and offenders, and for the better and more impartial trial of any indictment or information which ſhall be found, commenced, or proſecuted for any of the offences committed againſt the ſaid act, together with all reſtrictions, limitations, and mitigations by the ſaid act directed, ſhall, during the continuance of the ſaid act, extend to and be of force and effect in all caſes of offences committed by unlawfully and maliciouſly breaking down or cutting down the bank or banks of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged."

This clauſe was alſo made perpetual by the ſtat. 31 Geo. 2. c. 42. ſ. 5.

ſ. 5. *Unlawfully deſtroying or taking away piles, chalk, or other materials from ſea banks or walls* 20*l. penalty on ſummary conviction.*

By ſ. 5. of the ſtat. 10 Geo. 2. c. 32. reciting "That it frequently happens that idle and diſorderly people employed in fiſhing boats, and others reſiding near the ſea coaſts, do unlawfully and maliciouſly cut off, &c. and deſtroy the piles which are drove into the marſh or ſea

"walls

" walls and banks, whereby the chalk and other materials " uſed for ſecuring the ſaid walls and banks fall away, and " often times take the ſaid chalk and other materials uſed " for that purpoſe, and thereby frequent inundations hap- " pen to the lands lying within the ſaid walls and banks, to " the great damage of the owners and occupiers of the ſaid " lands; for remedy thereof," enacts, " that if any perſon " or perſons ſhall at any time or times hereafter unlawfully " cut off, draw up, or remove and carry away any piles, " chalk, or other materials, which are, or at any time " hereafter ſhall be driven into the ground, and uſed for " the ſecuring any marſh or ſea walls or banks, in order to " prevent the lands lying within the ſame from being over- " flowed and damaged," it ſhall be lawful for one or more juſtice of the peace reſiding near the place to hear the complaint in the manner there ſtated; and the offender upon conviction ſhall forfeit 20 l. &c. or in default of payment be committed to the houſe of correction, there to be kept at hard labour for ſix months.

Ch. XXII. § 31. *Sea and river banks.*

The duration of this proviſion was not limited to any particular time.

By the ſtat. 19 Geo. 2. c. 22. a ſummary juriſdiction is given to one or more juſtices of peace to inquire of and determine certain offences againſt the due preſervation of havens, roads, channels, and navigable rivers in England, by unloading rubbiſh, &c. out of veſſels within the ſame, or ſuffering old hulks to ſink there, or not removing ſuch as are ſtranded.

19 Geo. 2 c 22. *Diſcharging rubbiſh in harbours, or ſuffering ſtranded veſſels to remain, &c.*

17. *Locks and other Works on navigable Rivers.*

The firſt ſtatute paſſed on this ſubject was the 1 Geo. 2. ſt. 2. c. 19. intitled an act for puniſhing ſuch perſons as wilfully and maliciouſly deſtroy turnpikes, &c. " or locks " or other works erected by authority of parliament for " making rivers navigable," which reciting that evil diſpoſed perſons had deſtroyed turnpike gates, &c. and had " threat- " ened the pulling down and deſtroying of locks, ſluices, " and flood-gates, erected to preſerve and ſecure the navi- " gation of rivers made navigable purſuant to acts of parlia- " ment for that purpoſe; for preventing ſuch practices,

§ 32. *Locks, &c. on navigable rivers.* 1 Geo. 2. ſt. 2. c. 19.

Ch. XXII. § 12. *Locks, ſluices, &c.*

" and for rendering the ſaid acts more effectual," enacts, that if any perſon ſhall by day or night wilfully and maliciouſly break down, &c. or otherwiſe deſtroy any turnpike gate, &c. he ſhall be ſubject to certain corporal puniſhment upon conviction before two juſtices of peace, &c. Then by ſ. 2. " If any ſuch perſon or perſons ſo convicted ſhall, after " the ſaid 24th of *June* 1728, commit any of the offences " aforeſaid a ſecond time; or if any perſon or perſons ſhall, " either by day or night, wilfully and maliciouſly pull down or " demoliſh any houſe or houſes erected or to be erected for the " ſervice of any turnpike gate, &c. or ſhall wilfully and ma- " liciouſly break down or demoliſh any lock, ſluice, or flood- " gate, erected or to be erected by authority of parliament, " *upon any navigable river, for preſerving or ſecuring the naviga-* " *tion thereof*, and ſhall be lawfully convicted of the ſame re- " ſpectively upon indictment before any juſtices of aſſize, oyer " and terminer or gaol-delivery for the county, &c. borough " or corporation where ſuch offence or offences reſpectively " ſhall be committed; every ſuch perſon and perſons ſo of- " fending, and being thereof lawfully convicted, ſhall be " adjudged guilty of felony, and ſubject to the like pains " and penalties as in caſes of felony; and the court before " whom ſuch perſon or perſons ſhall be tried ſhall have au- " thority to tranſport ſuch felons for ſeven years, in like " manner as other felons," &c.

Maliciouſly demoliſhing locks, ſluices, &c. on navigable rivers, felony and tranſportation.

5 Geo. 2. c. 33.

Then the ſtat. 5 Geo. 2. c. 33. reciting that the act of the 1 Geo. 2., " for puniſhing ſuch perſons as wilfully and ma- " liciouſly pull down or deſtroy turnpikes or locks or " other works erected by authority of parliament, for ma- " king rivers navigable, and that the proviſions by the ſaid " act made for puniſhing *ſuch* offenders have been found in- " ſufficient; for remedy thereof and for rendering the ſaid " act more effectual," by ſ. 1. makes the malicious deſtroy- ing of turnpikes felony, and gives authority to tranſport every ſuch felon for ſeven years.

Returning from tranſportation, death.

Then by ſ. 2. it is further enacted, that " if *ſuch* offender " or offenders ſhall return into *Great Britain* or *Ireland* be- " fore the expiration of the ſaid term of ſeven years, con- " trary to the true intent or meaning hereof, *or of the ſaid* " *act paſſed in the 1ſt Geo.* 2. (ſtat. 2. c. 19.) he or they ſo " returning ſhall ſuffer death as felons, and have execution " awarded

" awarded againſt them as perſons attainted of felony, with- Ch. XXII. § 32.
" out benefit of clergy." *Locks, ſluices, &c.*

The words in Italics muſt refer to ſuch as being convicted of deſtroying ſluices, &c. were ſentenced to tranſportation under the ſtat. 1 Geo. 2., becauſe none other were tranſportable under that ſtatute, and therefore none other could return, *contrary to the true intent and meaning of the ſaid act*; although there be ſome obſcurity in the clauſe by the uſe of the relative word *ſuch* (ſuch offenders, &c.) in the beginning of it, which muſt mean *ſuch offenders* as are ſpoken of in the preamble of the act, and not merely ſuch as are laſt ſpoken of in the preceding enacting clauſe.

The third clauſe enables the truſtees, proprietors, &c. or other perſons authorized to put in execution any act or acts of parliament for repairing of highways *or* making rivers navigable out of the tolls, &c. to diſcharge the expences of any action, &c. indictment or other proſecution which ſhall be commenced on account of the deſtroying, &c. any turnpike gate, &c. " or any lock, ſluice, flood-gate, or other works on " any navigable river, erected or to be erected by authority " of parliament." *Expences of proſecution.*

Then the ſtat. 8 Geo. 2. reciting the act of the firſt and fifth of Geo. 2. and " that the proviſions for puniſhing *ſuch* " offenders had been found inſufficient, for rendering the *ſaid* " acts more effectual," enacts, " that if any perſon or per- " ſons whatſoever, after the 15th of May 1735, ſhall either " by day or night wilfully *or* maliciouſly pull down, pluck " up, throw down, level, or otherwiſe deſtroy any turnpike " gate (*a*), &c. or any lock, ſluice, flood-gate, or other works, " on any navigable river erected or to be erected by autho- " rity of parliament; or forcibly reſcue any perſon or per- " ſons, being lawfully in cuſtody of any officer or other per- " ſon for any of the offences before mentioned; that then " and in any of the ſaid caſes every perſon ſo offending, " being thereof lawfully convicted, ſhall ſuffer death, as in " caſes of felony, without benefit of clergy." 8 Geo. 2. c. 20. *Clergy.*

(*a*) So much of the act as reſpects turnpikes was afterwards repealed, *vide* ante, 1080.

Reſcuing offenders.

By ſ. 2. perſons wilfully and maliciouſly drawing up any flood-gate, fixed or made in any wear or lock made or to be made, &c. upon any navigable river, for preſerving the navigation thereof, are ſubject to impriſonment and hard la-

Ch. XXII. § 32. *Locks, ſluices, &c.*

bour for a month, upon a ſummary conviction before two juſtices of the peace.

Trial.

By ſ. 3. "Every offence aforeſaid done contrary to this "act ſhall and may be inquired of, examined, tried, and "determined in any adjacent county within that part of "*Great Britain* called *England*, in ſuch manner and form "as if the fact had been therein committed."

Pardon.

By ſ. 5. Offenders out of priſon diſcovering and convicting others guilty of the ſaid felonies ſhall be pardoned.

By ſ. 6. &c. a conditional remedy is given to recover damages againſt the hundred.

Theſe ſeveral acts having been ſuffered to expire, were all revived from the 1ſt of June 1742, for a certain period, by the ſtat. 15 Geo. 2. c. 33. ſ. 1. and continued by the ſtat. 20 Geo. 2. c. 47., and finally made perpetual by the ſtat. 27 Geo. 2. c. 16. A few years afterwards we find the following law.

4 Geo. 3. c. 12. ſ. 5. *Tranſportation.*

The ſtat. 4 Geo. 3. c. 12. ſ. 5. reciting that "the laws "then in being were not ſufficient for the preſervation of "the banks, flood-gates, ſluices, and other works belonging "to rivers and ſtreams made navigable by act of parliament, "and for maintaining the navigation on *ſuch* rivers and "ſtreams," enacts, "that from and after the paſſing of "this act, if any perſon or perſons ſhall wilfully *or* maliciouſly break, throw down, damage, or deſtroy, any "banks, flood-gates, ſluices, or other works; or open or "draw up any flood-gate or flood-gates, or do any other "wilful hurt or miſchief to any *ſuch* navigation, ſo as to "obſtruct, hinder, or prevent the carrying on, completing, "ſupporting, or maintaining ſuch navigation; every ſuch "perſon or perſons ſhall be adjudged guilty of felony, and "the Court before whom ſuch ſhall be tried and convicted "ſhall have authority to order ſuch perſon or perſons to "be tranſported for 7 years."

§ 33.

18. *Drainage Works, &c. in particular Places.*

In many inſtances particular proviſion has been made by the legiſlature againſt miſchief of the ſort now deſcribing in particular places. Amongſt others the following are to be found.

Powdike

Ch. XXII. § 73. *Powdike in marſh land.*

Powdike in Marſh Land.

By ſtat. 22 Hen. 8. c. 11. reciting that ill-diſpoſed perſons had at divers times "maliciouſly cut, caſt down, and "broken up parts of the dike called the *New Powdike*, in "marſh land in the county of Norfolk, and the broken "dike, otherwiſe called *Oldfield Dike*, by marſh land, in "the Iſle of Ely, in the county of Cambridge, by reaſon "whereof, &c. the ground and paſtures within the country "of marſh land, in the counties aforeſaid, have been "drowned, &c. and the inhabitants within the ſaid marſh "land and the level of the ſame put to great charges," &c. enacts, "that every ſuch perverſe and malicious cutting "down and breaking up of any part or parts of the ſaid "dikes, or of any other bank, being parcel of the rind "and uppermoſt part of the ſaid county of marſh land "aforeſaid, made for the defence and ſalvation of the ſame, "at any time from henceforth, by any perſon or perſons "committed and done, otherwiſe than in working upon "the ſaid banks or dikes, for the repairing, fortifying, and "mending of the ſame, be adjudged felony," &c.

22 H. 8. c. 11.

This ſtatute, which ſtood repealed after the ſtat. 1 Ed. 6. c. 12. ſ. 4. and 1 Mar. ſt. 1. c. 1. ſ. 5. was revived by ſtat. 2 & 3 Ph. & M. c. 19.

§ 31. *Bedford level.* 27 G. 2 c. 19. *Vide* 11 Geo. 2. c. 34. 14 Geo. 2. c. 24. 13 Geo. 3. c. 25 & 60. 21 Geo. 2 c. 18. and 23 Geo. 3. c. 25.

By the ſtat. 27 Geo. 2. c. 19. for (amongſt other things) the more effectually draining and preſerving the North Bedford level, and divers lands adjoining thereto in the manor of Crowland (ſ. 49.) "For the preventing the damming "up, ſtopping, throwing down, burning, &c. or damaging "any of the rivers, drains, &c. or other works already made "or erected for or towards draining the lands and grounds "contained within the ſaid ſeveral diſtricts and diviſions, or "any of them, or hereafter to be made, &c. for the purpoſes aforeſaid, by virtue of or under the powers and authorities of this act, it is enacted, that if any perſon or "perſons ſhall, at any time hereafter, maliciouſly cut, "break down, burn, demoliſh, or deſtroy, any bank, mill, "engine, flood-gate, or ſluice already made or erected, or "which ſhall, at any time hereafter, be making or erecting, "or made or erected, ſupported or maintained, for anſwer-

Ch. XXII. § 34. *Bedford level.*

" ing the purpoſes aforeſaid; every perſon or perſons ſo of-
" fending, being thereof convicted, ſhall be guilty of felony,
" without benefit of clergy. And if any perſon or perſons
" ſhall, at any time hereafter, maliciouſly ſtop, dam, or de-
" moliſh, damage, or deſtroy any river, drain, water-courſe,
" door, dam, bridge, or other work or works already made
" or erected, or which ſhall at any time hereafter be ma-
" king or erecting, or made or erected, ſupported or main-
" tained, for anſwering the purpoſes aforeſaid; every per-
" ſon or perſons ſo offending, being thereof convicted be-
" fore any two or more juſtices of the peace for the coun-
" ties and iſle aforeſaid, or either of them, &c. ſhall forfeit
" 100l. to the commiſſioners, &c. and in default of payment
" be ſent to the houſe of correction of the county or iſle
" where ſuch offence ſhall be committed, there to be kept
" to hard labour for ſuch time as ſuch juſtices ſhall direct,
" not exceeding ſix months."

§ 35. *Norfolk.* 42 Geo. 3. c. 22.

By an act of the 42 Geo. 3. c. 22. (of local acts) for in-cloſing and draining, &c. marſh lands and fens, &c. in the pariſh of Runham in the county of Norfolk, it is enacted, (ſ. 49.) " That if any perſon or perſons ſhall wilfully and
" maliciouſly cut, damage, break down, demoliſh, or deſtroy
" any bank, mill, engine, dam, floodgate, bridge, ſluice, or
" tunnel, already made, or which ſhall at any time hereafter
" be made or erected, ſupported, maintained, or uſed for
" anſwering any of the purpoſes of this act; every perſon
" ſo offending, and being convicted thereof, ſhall be deemed
" guilty of felony; and the Court before whom ſuch perſon
" ſhall be tried and convicted ſhall have authority to cauſe
" ſuch perſon or perſons to be tranſported for 7 years, or in
" mitigation of ſuch puniſhment may award ſuch ſentence
" as the law directs in caſes of petit larceny."

§ 36. *Devon.* 42 Geo. 3. c. 32.

By ſtat. 42 Geo. 3. c. 32. for embanking and preſerving from the ſea certain lands ſituate between Great Prince Rock and the village of Crabtree, called Tothill Bay and Lipſon Bay, near Plymouth in the county of Devon, it is enacted, (ſ. 46.)
" That if any perſon or perſons ſhall wilfully and maliciouſly
" break, throw down, damage, or deſtroy any of the banks,
" mounds, dams, or other works to be erected or made by
" virtue

" virtue of this act, every ſuch perſon ſhall be deemed guilty " of felony, and ſhall on being lawfully convicted thereof " be ſubject to the like pains and penalties as in caſes of " felony; and the Court before whom ſuch perſon ſhall be " tried and convicted ſhall have authority to cauſe ſuch " perſon to be puniſhed in like manner as felons, &c. or in " mitigation of ſuch puniſhment ſuch Court may award " ſuch ſentence as the law directs in caſes of petit " larceny." Ch. XXII. § 36. *Devon.*

19. *Weſt-India Docks.*

By the act of the 39 Geo. 3. c. 69. for improving the port of London, it is enacted, (ſ. 4.) that if any perſon or " perſons whoſoever ſhall wilfully and maliciouſly ſet on fire " any of the works to be made by virtue of this act, or any " ſhip or other veſſel lying or being in the ſaid canal, or in any " of the docks, baſons, cuts, or other works to be made by " virtue of this act; every perſon ſo offending in any of the " ſaid caſes ſhall be adjudged guilty of felony without benefit " of clergy. And if any perſon or perſons ſhall knowingly, " wilfully, or maliciouſly demoliſh, break down, cut or deſtroy " any of the works to be made by virtue of this act, or any ſhip " or veſſel lying in the ſaid canal, or in any of the ſaid docks, " baſons, cuts, or other works; then every ſuch offender, " being convicted thereof, ſhall ſuffer puniſhment by fine, " impriſonment, or tranſportation, at the diſcretion of the " Judges, &c. before whom ſuch offender ſhall be tried and " convicted." § 37. *Weſt India docks.* 39 Geo. 3. c. 69. (local.)

By ſ. 105. " In caſe any perſon or perſons whoſoever " ſhall wilfully or maliciouſly cut, break, or in any manner " deſtroy any rope or other thing by which any ſhip or other " veſſel lying in the ſaid canal, or in any of the ſaid docks, " baſons, or cuts, *or in any place or places in the River Thames,* " *between London Bridge and the mouth of the River Lea,* " ſhall be moored or faſtened, ſuch perſon or perſons ſhall, " for every ſuch offence, forfeit and pay a ſum not exceed- " ing 10*l.*" &c. *Deſtroying mooring ropes, &c. in certain places in the Thames.* *Vi.* poſt, ſ. 44.

20. *The King's Ships, Dock Yards, &c.*

The offence of embezzling the King's ſtores has been before treated of; and further the ſtat. 12 Geo. 3. c. 24. entitled § 38. *King's ſhips, docks, ſtores, &c.* 12 Geo. 3. c. 24. Ante, 621.

Ch. XXII. § 38. *King's ſhips, docks, &c.*

titled "An act for the better ſecuring and preſerving his "Majeſty's dock-yards, magazines, ſhips, ammunition and "ſtores," reciting that "Whereas the ſafety and preſerva- "tion of his Majeſty's ſhips of war, arſenals, magazines, "dock yards, rope yards, victualling offices, military, naval, "and victualling ſtores, and the places where ſuch ſtores "are kept or depoſited, either within this realm, or in any "of the iſlands, countries, forts, or places thereunto belong- "ing, is of great importance to the welfare and ſecurity of "the kingdom;" enacts, "that if any perſon or perſons ſhall, "either within this realm, or in any of the iſlands, countries, "forts, or places thereunto belonging, wilfully and malici- "ouſly ſet on fire, or burn or otherwiſe deſtroy, or cauſe to "be ſet on fire, or burnt or otherwiſe deſtroyed, or aid, pro- "cure, abet or aſſiſt in the ſetting on fire, or burning, or "otherwiſe deſtroying of any of his Majeſty's ſhips or veſſels "of war, whether the ſaid ſhips or veſſels of war be on float "or building, or begun to be built in any of his Majeſty's "dock-yards, or building or repairing by contract in any pri- "vate yards, for the uſe of his Majeſty; or any of his Ma- "jeſty's arſenals, magazines, dock-yards, rope-yards, victual- "ling offices, or any of the buildings erected therein or be- "longing thereto; or any timber or materials there placed, "for building, repairing, or fitting out of ſhips or veſſels; or "any of his Majeſty's military, naval, or victualling ſtores, "or other ammunition of war; or any place or places where "any ſuch military, naval, or victualling ſtores, or other am- "munition of war is, are, or ſhall be kept, placed, or depo- "ſited; that then the perſon or perſons guilty of any ſuch "offence, being thereof convicted in due form of law, ſhall "be adjudged guilty of felony, without benefit of clergy."

Wilfully ſetting on fire, &c. ſhips of war, dock-yards, &c felony without clergy.

Trial.

By ſ. 2. "any perſon who ſhall commit any of the offences "before mentioned, in any place out of this realm, may be "indicted and tried for the ſame, either in any ſhire or county "within this realm, in like manner and form as if ſuch of- "fence had been committed within the ſaid ſhire or county, "or in ſuch iſland, country, or place where ſuch offence ſhall "have been actually committed, as his Majeſty, his heirs, "&c. may deem moſt expedient for bringing ſuch offender to "juſtice; any law, uſage, or cuſtom notwithſtanding."

Vide 22 Geo. 2. c. 33.

Cognizance of ſimilar offences is given to Courts Martial by the naval articles of war, ſ. 24. and 25.

21. *Private Ships, Wrecks, &c.*

§ 39.
Private ſhips.
22 & 23 Car. 2. c. 11.
Wilful deſtruction of ſhips, felony.
Vide ante, 800.

The ſtat. 22 & 23 Car. 2. c. 11. ſ. 12. reciting that "it "often happens that maſters and mariners of ſhips having "inſured or taken upon bottomry greater ſums of money "than the value of their adventure, do wilfully caſt away, "burn, or otherwiſe deſtroy the ſhips under their charge, to "the merchants and owners great loſs; for the prevention "thereof for the future enacts, that if any captain, maſter, "mariner, or other officer belonging to any ſhip ſhall wilfully "caſt away, burn, or otherwiſe deſtroy the ſhip unto which "he belongeth, or procure the ſame to be done, he ſhall "ſuffer death as a felon."

1 Ann. ſt. 2. c. 9. ſ. 4.

By ſtat. 1 Ann. ſt. 2. c. 9. ſ. 4. "For the effectual pre- "venting the wilful caſting away, burning, or otherwiſe de- "ſtroying by maſters and mariners of ſhips under their "charge, it is enacted, that if any captain, maſter, mariner, "or other officer belonging to any ſhip, ſhall, after the 12th "of February 1702, wilfully caſt away, burn, or otherwiſe "deſtroy the ſhip unto which he belongeth, or procure the "ſame to be done, to the prejudice of the owner or owners "thereof, or of any merchant or merchants who ſhall load "goods thereon, he ſhall ſuffer death as a felon."

Trial.
Vide poſt.

And by ſ. 5. "all and every the ſaid offence and offences "committed on the high ſeas, or where the Admiralty hath "juriſdiction, ſhall be inquired of, tried, &c. and judged in "ſuch ſhires and places in the realm as ſhall be limited by "the Queen's commiſſion under the great ſeal, in ſuch man- "ner and form as by ſtat. 28 Hen. 8. c. 15 is directed for the "trial of pirates, and all and every perſon and perſons who "ſhall be convicted of any of the ſaid offence or offences laſt "mentioned, or ſhall ſtand mute, or peremptorily challenge "above 20 of the jury, ſhall ſuffer death without benefit of "clergy."

Vide tit. *Piracy.*

Excluded clergy.

§ 40.
Ships in diſtreſs of ſtranding.
12 Ann. ſt. 2. c. 18.

The ſtat. 12 Ann ſt. 2. c. 18. entitled "An act for pre- "ſerving all ſuch ſhips and goods thereof which ſhall happen "to be forced on ſhore or ſtranded upon the coaſts of this "kingdom or any other of her Majeſty's dominions," re- citing "that great complaints had been made by merchants,

Ch. XXII. §40. *Ships.*

" as well her Majeſty's ſubjects as foreigners trading to and " from this kingdom, that many ſhips of trade have un- " fortunately near home run on ſhore or been ſtranded on " the coaſt thereof, and that ſuch ſhips have been barba- " rouſly plundered by her Majeſty's ſubjects, and their car- " goes embezzled," &c. provides that the ſheriffs and other peace officers, &c. and officers of the cuſtoms, ſhall, on the application of any commander, or chief officer " of any ſhip " or veſſel of any of her Majeſty's ſubjects or others being " in danger of being ſtranded or run on ſhore, or being " ſtranded or run on ſhore," give their aſſiſtance, &c. and are empowered to command the conſtables of the neareſt ports to ſummon as many men as ſhall be neceſſary to aſſiſt, &c.; and if there be any man of war, or merchant ſhip or veſſel riding at anchor near, any of the ſaid officers of the cuſtoms or conſtables are required to demand aſſiſtance of the ſuperior officers of ſuch ſhip, to aid ſuch veſſel in diſtreſs, who in caſe of refuſal or neglect, ſhall forfeit 100 *l.* to be recovered in an action of debt, &c. by the ſuperior officer of the ſhip ſo in diſtreſs.

Perſons entering ſhip without leave,

By ſ. 3. " If any perſon or perſons whatſoever (beſides " thoſe empowered by the ſaid officer of the cuſtoms, or his " deputy, or the conſtables as aforeſaid) ſhall enter or en- " deavour to enter on board any ſuch ſhip or veſſel ſo in " diſtreſs as aforeſaid, without the leave or conſent of the " commander or other ſuperior officer of the ſaid ſhip, or " of the ſaid officer of the cuſtoms, &c. or ſome or one of " them employed for the ſervice and preſervation of the ſaid *or moleſting or hindering others in ſaving the ſhip. Vide poſt* 1100. *ſt.* 26 Geo. 2. " ſhip or veſſel as aforeſaid; or in caſe any perſon ſhall mo- " leſt him, them, or any of them in the ſaving of the ſaid " ſhip, veſſel, or goods, or ſhall endeavour to impede or " hinder the ſaving of any ſuch ſhip, veſſel, or goods; or " when any ſuch goods are ſaved, ſhall take out or deface " the marks of any ſuch goods, before the ſame ſhall be ta- " ken down in a book or books for that purpoſe provided " by the commander or ruling officer and the firſt officer of *ſhall make double ſatisfaction to party grieved at diſcretion of two magiſtrates, or be ſent to houſe of correction for* 12 *months.* " the cuſtoms as aforeſaid; ſuch perſon or perſons ſhall, " within 20 days, make double ſatisfaction to the party " grieved, at the diſcretion of the two next juſtices of peace, " or in default thereof ſhall, by ſuch juſtices of peace, be " ſent to the next houſe of correction, where he ſhall con-

" tinue

" tinue and be employed in hard labour by the ſpace of 12 " months then next enſuing. And that it ſhall be lawful " for any commander or ſuperior officer of the ſaid ſhip or " veſſel ſo in diſtreſs as aforeſaid, or for the ſaid officer of " the cuſtoms or conſtables on board the ſame ſhip or veſ- " ſel, to repel by force any ſuch perſon or perſons as ſhall " without ſuch leave or conſent from the ſaid commander " or ſuperior officer, or the ſaid officer of the cuſtoms or " his deputy, or ſuch conſtables as aforeſaid, preſs on board " the ſaid ſhip or veſſel ſo in diſtreſs, as aforeſaid, and there- " by moleſt them in the preſervation of the ſaid ſhip or veſ- " ſel ſo in diſtreſs as aforeſaid."

Ch. XXII. § 40. *Ships.*

§ 41. *Making holes in ſuch ſhip in diſtreſs, &c. felony without clergy. Vide* ante, 648.

Then by ſ. 5. " If any perſon or perſons ſhall make or " be aſſiſting in the making any hole in the bottom, ſide, " or any other part of any ſhip or veſſel ſo in diſtreſs as " aforeſaid, or ſhall ſteal any pump belonging to any ſhip or " veſſel ſo in diſtreſs as aforeſaid, or ſhall be aiding or abet- " ting in the ſtealing ſuch pump as aforeſaid, or ſhall wilfully " do any thing tending to the immediate loſs or deſtruction " of ſuch ſhip or veſſel; ſuch perſon or perſons ſhall be guilty " of felony, without benefit of clergy."

This act was made perpetual by the ſtat. 4 Geo. 1. c. 12. with a proviſo (ſ. 2.) ſaving the Admiralty juriſdiction of the Cinque Ports, and the officers thereto belonging, who are empowered to put the act in force within their juriſdiction.

Made perpetual by 4 Geo. 1. c. 12. *Saving Admiralty juriſdiction of Cinque Ports.*

And by ſ. 3. " for the effectual preventing the wilful " caſting away, burning, or otherwiſe deſtroying of ſhips by " the owners, maſters, and mariners thereof and thereto be- " longing, it is enacted, that if any owner of, or captain, " maſter, mariner, or other officer belonging to any ſhip, " ſhall, after the 24th of June 1718, wilfully caſt away, " burn, or otherwiſe deſtroy the ſhip of which he is owner, " or unto which he belongeth, or in any manner of wiſe di- " rect or procure the ſame to be done to the prejudice of " any perſon or perſons that ſhall underwrite any policy or " policies of inſurance thereon, or of any merchant or mer- " chants that ſhall load goods thereon, he ſhall ſuffer death."

4 Geo. 1. c. 12. *Owners, maſters, or mariners deſtroying ſhips to the prejudice of underwriters, &c. death.*

This proviſion is explained and enforced by the ſtat. 11 Geo. 1. c. 29. ſ. 5. & 6., which reciting the laſt-mentioned act, and that " ſome doubts had ariſen touching the nature

11 Geo. 1. c. 29. ſ. 5. & 6. *Wilfully deſtroying ſhips by owner, maſter, or*

Ch. XXII. § 41. *Ships.*

of "the offence provided againſt by the ſaid recited act, "and the trial and puniſhment to be had and inflicted for "the ſame, therefore enacts and declares that if any owner "of, or captain, maſter, officer or mariner belonging to any "ſhip or veſſel, ſhall, after the 24th of June 1725, wilfully "caſt away, burn, or otherwiſe deſtroy the ſhip or veſſel "of which he is owner, or to which he belongeth, or in "anywiſe direct or procure the ſame to be done, with in- "tent or deſign to prejudice any perſon or perſons that hath "or ſhall underwrite any policy or policies of inſurance "thereon, or of any merchant or merchants that ſhall load "goods thereon, or of any owner or owners of ſuch ſhip "or veſſel; the perſon or perſons offending therein, being "thereof lawfully convicted, ſhall be deemed and adjudged "a felon or felons, and ſhall ſuffer as in caſes of felony, "without benefit of clergy."

mariner, to prejudice inſurers thereon, or merchants having laden goods on board, felony without clergy. Vide poſt.

Trial. Vide Rex v. Snape and Aires, ante, 807. and poſt, ſt. 26 G. 2. c. 19. ſ. 8.

Sect. 7. enacts, "that if any of the ſaid offences, in wil- "fully caſting away, burning, or otherwiſe deſtroying any "ſhip or veſſel as aforeſaid, ſhall be committed within the "body of any county of this realm, the ſame ſhall and may "be inquired of, tried, determined, and adjudged in the "ſame Courts, in ſuch manner and form as felonies done "within the body of any county by the laws of this realm "are to be inquired of, &c. And if any of the ſaid of- "fences ſhall be committed upon the high ſeas, the ſame "ſhall be inquired of, &c. before ſuch court, and in ſuch "manner and form as by ſtat. 28 Hen. 8. (c. 15.) entitled "*for pirates*, is directed and appointed for the inquiring, &c. "of felonies done upon the high ſeas."

§ 42. *What a caſting away or deſtroying.*

Upon the conſtruction of the acts of the 4 & 11 Geo. 1. it has been ruled, that if the ſhip be only run aground or ſtranded upon a rock, and be afterwards got off in a condition capable of being eaſily refitted, ſhe cannot be ſaid to be *caſt away or deſtroyed*; and therefore it is not within either of theſe ſtatutes. Upon this diſtinction Auguſtin de Londo, the maſter of a Spaniſh veſſel, called El Principi de Eſpana, was acquitted at an Admiralty ſeſſion holden before Sir T. Saluſbury, and Yates and Aſton, juſtices.

De Londo's caſe, Admiralty, 9th July 1765, 2 MS. Sum. 325.

To the prejudice of underwriters. 2 MS. Sum. 325.

If the inſurance be only on the cargo, and not on the ſhip, it is not within that branch of the ſtatutes relating to the prejudice

prejudice of underwriters: for the words are "to the pre- Ch. XXII. §42. *Ships.*
"judice of any perſon that ſhall underwrite any policy of "infurance *thereon*," ſhips only being before-mentioned; and penal ſtatutes are to be conſtrued ſtrictly.

Pow's caſe, O. B. 1754, 1 Leach, 54. *A perſon who is acceſſary to a felonious ſhipwreck is not within* 4 Geo. 1. c. 12. *unleſs he belong to the ſhip.*

At the Admiralty Seſſions holden at the Old Bailey on the 25th of February 1754, before Adams B., Sir Thomas Saluſbury Knt. Judge of the court of Admiralty, Sir T. Birch Knt. and others, John Lancey and John Lloyd were indicted on the ſtat. 11 Geo. 1. c. 29. for unlawfully burning and deſtroying the ſhip Nightingale, whereof T. Benſon was owner, with intention to defraud the underwriters therein named; and Thomas Pow was charged in the ſame indictment as an acceſſary before the fact, for counſelling and adviſing the ſaid Lancey and Lloyd to commit the felony aforeſaid. It appeared in evidence that Benſon, the owner of the ſhip, rented the iſland of Lundy, ſituated in the mouth of the Briſtol channel, near the middle, between Devonſhire and Pembrokeſhire, (long. 4. 40. W., lat. 60. 25. N.) but within the county of Devon. That Pow was a taylor and ſalesman, living near the point of Appledore, a town in Kent. That the ſhip was freighted with ſalt, dry goods, maunds of pewter, and a caſk of combuſtibles, and inſured by Benſon for 400 l. from Appledore to Maryland. That Pow ſhipped the ſeamen on board at Appledore, and ſhe ſailed from thence to Lundy iſland, where the dry goods and pewter were unloaded and buried under ground among the rocks. That while the veſſel lay in Lundy road, in fourteen fathoms water, Pow went on board her, and gave ſeveral of the crew notes of hand, promiſing to pay them a certain ſum of money, as a compenſation for their clothes, &c. *in caſe the ſhip was loſt by any misfortune between that place and the cape of Virginia on her outward-bound paſſage.* That Pow returned on ſhore; the ſhip ſet ſail; and the morning after, Lancey the captain gave orders to ſet the ſhip on fire, which was accordingly done. The jury acquitted Lloyd, and found Lancey guilty (*a*). They alſo found ſpecially, "That Thomas Pow, before the ſaid felony "was committed by Lancey, did, near the iſland of Lundy "within the county of Devon, incite, &c. and counſel the

(*a*) He was executed at Execution Dock on Friday June 7th, 1754.

"ſaid

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" ſaid John Lancey to commit the ſame; but that the ſaid " T. Pow was neither owner, maſter, captain, or mariner " of the ſaid ſhip."

Upon the verdict two queſtions were ſubmitted to the opinion of the Judges: firſt, Whether an acceſſary upon the land to the offence of burning a ſhip, which offence is afterwards committed upon the high ſeas, be within the juriſdiction of the court of Admiralty? or, Whether he ought not to be indicted and tried at the aſſizes for the county within which his offence was committed? ſecondly, Whether Thomas Pow, being a perſon in trade, living at Appledore point, and found by the verdict not to be either owner, maſter, captain, or mariner of the veſſel burnt, were within the meaning of the ſtat. 4 Geo. 1. c. 12. explained by 11 Geo. 1. c. 29. ſ. 6. upon which the indictment was founded; that ſtatute only ſaying, " That if any owner, captain, maſter, " mariner, or other officer belonging to any ſhip, ſhall wil- " fully burn," &c.? The Judges were of opinion, that Thomas Pow, upon the finding of the jury, was not an offender within the meaning of the ſtat. 4 Geo. 1. c. 12. but they gave no opinion upon the firſt point.

§ 43. *Offences againſt ſhips by ſtrangers.*

Many offences however of this nature may be committed by perſons not belonging to the particular ſhip.

Plunder or deſtruction of goods on board ſhips.

Thus the entering by force on board any ſhip in diſtreſs, and deſtroying the marks on the goods, is puniſhable as a miſdemeanor on ſummary conviction before magiſtrates by

12 Ann. ante, 1095.

the ſtat. 12 Ann. ſt. 2. c. 18. ſ. 3. in the manner and under the circumſtances therein ſet forth. The principal object of that proviſion was certainly to guard againſt thievery and

8 Geo. 1. c. 24. ante, p. 801.

plunder. With the ſame view the ſtat. 8 Geo. 1. c. 24. before ſtated puniſhes as pirates ſuch as forcibly enter merchant ſhips, and throw overboard or deſtroy any part of the goods or merchandizes belonging to the ſame, though the ſhip itſelf be not carried off. And this was again followed

26 Geo. 2. c. 19. ſ. 1. *wide* ante, 648. & 422.

up by the ſtat. 26 Geo. 2. c. 19. ſ. 1. whereby " If any per- " ſon or perſons ſhall plunder, ſteal, take away, or *deſtroy* any goods or merchandizes or other effects, from or belonging to any ſhip or veſſel of his Majeſty's ſubjects or others, " which ſhall be in diſtreſs, or which ſhall be wrecked, " loſt, ſtranded, or caſt on ſhore in any part of his Ma-

jeſty's

" jeſty's dominions, (whether any living creature be on board ſuch veſſel or not (*a*),) or any of the furniture, tackle, apparel, proviſion, or part of ſuch ſhip or veſſel; or ſhall beat or wound with intent to kill or deſtroy, or ſhall otherwiſe wilfully obſtruct the eſcape of any perſon endeavouring to ſave his or her life from ſuch ſhip or veſſel, or the wreck thereof: or if any perſon or perſons ſhall put out any falſe light or lights, with intention to bring any ſhip or veſſel into danger; then ſuch perſon or perſons ſo offending ſhall be deemed guilty of felony, and being lawfully convicted thereof, ſhall ſuffer death as in caſes of felony, without benefit of clergy."

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Obſtructing the eſcape of any perſon from wreck. Ante, 422.

Putting out falſe lights to bring ſhips into danger.

The act then makes ſeveral proviſions againſt the plundering of veſſels loſt or ſtranded, and for the detection and puniſhment of offenders. And then by ſ. 8. regulates the trial in manner before ſtated.

Trial. Ante, 649.

S. 12. empowers any one juſtice of the peace, or more " in caſe of need and in the abſence of the ſheriff, to take " ſufficient power of the country to repreſs all unjuſt violence, and duly to enforce the execution of the act."

Juſtices of peace may take force to repreſs violence.

S. 16. enacts that the ſtat. 12 Ann. ſt. 2. c. 18. and 4 Geo. 1. c. 12. " ſhall in all things remain in full force " ſave only ſo far as the ſame are altered or changed by this " preſent act."

By ſ. 18. the act is not to extend to Scotland.

§ 44.

Again by ſtat. 2 Geo. 3. c. 28. ſ. 13. for the preventing thefts and frauds by perſons navigating boats on the river Thames; " If any perſon or perſons ſhall cut, damage, or " ſpoil, any cordage, cable, buoys, buoy rope, head-faſt, " or other faſt, fixed to any anchor or moorings belonging " to any ſhip or veſſel at anchor or mooring in the river " Thames, or any rope uſed for the purpoſe of mooring " or rafting maſts or timber; or ſhall be aiding or aſſiſting " therein; with an intent to ſteal the ſame; ſuch perſon " or perſons ſhall, being convicted thereof on the oath of " two or more credible witneſſes, be tranſported to ſome of " his Majeſty's plantations in America for 7 years, accord- " ing to the laws now in force for the tranſportation of " felons."

In Thames. 2 Geo. 3. c. 28. *Cutting or damaging cordage, &c. with intent to ſteal, tranſportation.* Ante, ſ. 37.

(*a*) *Vide* ante, 648. *n.*

As

Ch. XXII. § 44. *Ships.*

As this clauſe does not expreſsly declare the offenders to be felons, it is ſubject to the like obſervations as were before noted in reſpect of the preceding clauſe of the ſame ſtatute againſt receivers of goods ſtolen from ſuch ſhips: and ſeems by the opinion of the legiſlature expreſſed in the ſtat. 39 & 40 Geo. 3. c. 87. ſ. 22. to reſt in miſdemeanor.

Ante, 753, 4.

Obſtructing execution of act.

Alſo by ſ. 19. "In caſe any perſon or perſons acting in "the execution of any of the powers granted by this act, "ſhall be obſtructed therein; every perſon ſo obſtructing, "and all ſuch as ſhall act in their aſſiſtance, ſhall, on being "thereof convicted before the juſtices of the peace at the "general or quarter ſeſſions of the county or city adjoining "to the ſaid river, upon the oath of two or more credible "witneſſes, be tranſported to any of his Majeſty's planta-"tions in America for ſeven years, according to the laws "now in force for the tranſportation of felons."

This by ſ. 23. ſhall be deemed a public act.

§ 45. *King's ſhips wilfully or negligently running down, &c. others.* 22 Geo. 2. c. 33.

Alſo the naval articles of war provide, by article 26. that "Care ſhall be taken in the conducting and ſteering of any "of his Majeſty's ſhips, that through wilfulneſs, negligence, "or other defaults, no ſhip be ſtranded, or run upon any "rocks or ſands, or ſplit, or hazarded; upon pain that ſuch "as ſhall be found guilty therein be puniſhed with death, "or ſuch other puniſhment as the offence by a court mar-"tial ſhall be judged to deſerve."

§ 46. 33 Geo. 3. c. 67. *Seamen, &c. wilfully ſetting fire to any ſhip, to ſuffer death;*

By ſtat. 33 Geo. 3. c. 67. ſ. 3. (made perpetual by ſtat. 41 Geo. 3. c. 19.) "If any ſeaman, keelman, caſter, or ſhip "carpenter, or other perſon or perſons, ſhall, at any time "after the 24th of June 1793, wilfully and maliciouſly "burn or ſet fire to any ſhip, keel, or other veſſel; every "perſon ſo offending, and being thereof lawfully convicted, "in any court of oyer and terminer, to be holden in and "for the county, &c. or diſtrict wherein the offence was "committed, ſhall be adjudged guilty of felony without "benefit of clergy."

and deſtroying or damaging them by any other means, to be tranſported.

And by ſ. 6. "If any ſeaman, keelman, caſter, ſhip-"carpenter, or other perſon or perſons, ſhall after the 24th "of June 1793, wilfully and maliciouſly deſtroy or damage "any ſhip, keel, or other veſſel, (otherwiſe than by fire,)

"every

" every ſeaman, keelman, caſter, ſhip-carpenter, and other Ch. XXII. § 46.
" perſon ſo offending, and being thereof lawfully convicted *Ships.*
" upon any indictment to be found againſt him, her, or
" them, in any court of oyer and terminer, or general or
" quarter ſeſſions of the peace, to be holden reſpectively in
" and for the county, &c. or diſtrict wherein the offence
" was committed, ſhall be adjudged guilty of felony, and
" ſhall be tranſported to ſome of his Majeſty's dominions
" beyond the ſeas, for any ſpace of time or term of years
" not exceeding 14 years nor leſs than ſeven years."

By ſ. 7. in caſe any of the ſaid offences ſhall be committed *Trial.*
" on the high ſeas, then and in every ſuch caſe the offence
" or offences ſo committed ſhall be triable, and the perſon
" or perſons ſo offending may be proſecuted and tried by
" virtue of this act in any ſeſſion of oyer and terminer and
" gaol delivery, for the trial of offences committed on the
" high ſeas, within the juriſdiction of the Admiralty of
" England, &c.

By ſ. 8. " No perſon ſhall be proſecuted by virtue of this *Limitation.*
" act for any of the offences aforeſaid, unleſs ſuch proſecu-
" tion be commenced within 12 calendar months after the
" offence committed."

CHAP. XXIII.

THREATENING LETTERS OR WRITINGS.

The Statutes. - - - - § 1.

By Stat. 9 Geo. 1. c. 22. ſending Letter without Name, or with fictitious Name, demanding Money, Veniſon, or other valuable Thing, or reſcuing any Offender in Cuſtody for the ſame, &c. Felony without Clergy. *ib.*

Extended by Stat. 27 Geo. 2. c. 15. to ſending ſuch Letter, threatening to kill any Perſon, or burn their Houſes, &c. though no valuable Thing be demanded. *ib.*

By Stat. 32 Geo. 2. c. 24. ſending or delivering Letter, or Writing, with or without Name, or with fictitious Name, threatening to accuſe another of Offence puniſhable with Death, Tranſportation, or infamous Puniſhment, with Intent to extort Money, Goods, Wares, or Merchandizes, puniſhable as Miſdemeanor, or with Tranſportation. *ib.*

By Stats. 12 Geo. 1. c. 34. and 22 Geo. 2. c. 27. writing or ſending any Letter, or other Writing, or Meſſage to Maſters by Perſons employed in the Woollen, Felt, Hat, Silk, Mohair, Fur, Hemp, Flax, Linen, Cotton, Fuſtian, Iron, or Leathern Manufactures; Felony, and Tranſportation. *ib.*

Conſtruction of the Statutes.

What Letters within them. - - - § 2.

A Letter ſigned with initials is a Letter *without a Name*, within the Stat. 9 Geo. 1. *ib.*

Demanding, within that Statute, means an aſking accompanied with expreſs or implied Threat in caſe of Non-

Non-compliance. *ib.* And though the Threat be of a Charge of Murder, it is Felony within that Statute if there be an actual Demand; for the Stat. 30 Geo. 2. c. 24. which makes it a Misdemeanor, only reaches Cases falling short of an actual Demand. - § 2.

A Bank Note is a *valuable Thing* within the Stat. 9 Geo. 1. *ib.*

A Letter containing a Threat to set Fire to *Prosecutor's Mill* in which he had *then no Property*, held not within the Stat. 27 Geo. 2. c. 15. *ib.*

So a Threat by Prisoners to do *all the public Injury they were able* to Prosecutor's Farms, &c. held not necessarily to imply a *Burning* within the same Statute. *ib.*

But a Letter accusing Prosecutor of having taken away the Life of a Friend of the Writer's, who was come to revenge him, is Evidence to go to the Jury of sending a Letter threatening to kill and murder Prosecutor. *ib.* (& s. 4.)

A threatening Letter referring to such Circumstances as were plainly intended to denote the Writer, as by making Demand of a particular Sum in Controversy between him and the Prosecutor is not within the Stat. 9 Geo. 1. or 27 Geo. 2. although no Name be subscribed. *ib.*

Distinctions between the several Statutes. - § 3.

As to the Offence—Names, &c. to the Letters—Letters or Writings—Things demanded—Intent, &c. *ib.*

Indictment on Stat. 30 Geo. 2. c. 24. for sending threatening Letter with Intent to extort *Money*, not proved by shewing a Letter containing a Threat of a false Accusation, if he did not give up a *Bill of Exchange* drawn by the Writer. *ib.*

What a Sending of the Letter. - - § 4.

Distinguished by the Stat. 30 Geo. 2. from a *Delivery*. *ib.*

Where the *Wife wrote* a threatening Letter, and the *Husband delivered it* to Party threatened; held that the Husband, though privy to the Writing, was not

within Stat. 9 Geo. 1. or 27 Geo. 2.; nor could the Wife alone be convicted, unleſs ſhe wrote and ſent it without her Huſband's Privity. - §4.

Evidence that Priſoner delivered a threatening Letter ſealed up to another, by whom it was put in the Poſt, and ſo conveyed to Proſecutor, is ſufficient to go to the Jury of a Sending ſuch Letter knowing the Contents. *ib.*

So throwing the Letter into Proſecutor's Yard, where it was taken up by his Servant and carried to him, is a *Sending*. *ib.*

So dropping it in a Room frequented by Proſecutor, where it was picked up by one and given to him. *ib.*

Indictment and Evidence. - - §5.

The *Letter* itſelf muſt be ſet forth in the Indictment. *ib.*

The Precedents in general allege that the Letter was ſent *to* the Party: but ſaid to be ſufficient to allege that it was *ſent directed to* the Proſecutor. *ib.*

But Evidence of ſending the Letter by the Poſt, or dropping it where it is likely to be picked up and given to Proſecutor, by whom it is afterwards received, is Evidence of a *Sending to* him. *ib.*

Prior and ſubſequent Letters to the one ſtated in the Indictment may be given in Evidence to explain it. §6.

Trial. - - - §7.

May be in any County under Stat. 9 Geo. 1. And under the other Statutes may be in the County where the Letter was *received*, though ſent in the firſt Inſtance by the Priſoner in another County. *ib.*

Threatening Letters or Writings.

§1. *General view of the offences in the ſtatutes.* 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 42.

THE occaſion and object of the laws in force againſt the offence of ſending threatening letters and writings to others are well explained in the preamble of the Black Act, which recites that ill-deſigning and diſorderly perſons had of late aſſociated themſelves, &c. "and had ſent letters in fictitious

" titious names to several persons demanding venison and " money, and threatening some great violence if such their " unlawful demands should be refused, or if they should be " interrupted in or prosecuted for such their wicked prac- " tices; and had actually done great damage to several per- " sons who have either refused to comply with such demands, " or have endeavoured to bring them to justice:" and then enacts, that " if any person or persons (whether armed or " disguised or not) shall knowingly send any letter without " any name subscribed thereto, or signed with a fictitious " name, demanding money, venison, or other valuable " thing; or shall forcibly rescue any person being lawfully " in custody of any officer or other person for any such of- " fence; or if any person or persons shall by gift or promise " of money or other reward procure any of his Majesty's " subjects to join him or them in any such unlawful act; " every person so offending, being thereof lawfully convict- " ed, shall be adjudged guilty of felony without benefit of " clergy."

Sending letter without name, or with fictitious name, demanding any valuable thing, felony without clergy.

By s. 4. such offenders not surrendering themselves when demanded by the King's proclamation, and making full confession of their accomplices, are made guilty of felony without benefit of clergy. And by s. 5. persons who after the time for such surrender expired shall " conceal, aid, abet, or succour any such offender, knowing him to have been so charged, and to have been required to surrender by such order," shall on conviction be guilty of felony without benefit of clergy.

Surrender clause, vide Process to bring in party.

By s. 14. such offences may be tried in any county of England.

Trial. Post, 1125.

Then the stat. 27 Geo. 2. c. 15. reciting the said law, and " that divers letters had been sent to several of his Majesty's " subjects threatening their lives, or the burning their houses, " which letters not demanding money, venison, or any " valuable effects, were not subject to the penalties of the " said act; to prevent the like mischievous and iniquitous " proceedings for the future," enacts, that " if any person " or persons, after the 1st of May 1754, shall knowingly " send any letter without any name subscribed thereto, or " signed with a fictitious name or names, letter or letters, " threatening to kill or murder any of the King's subject or

27 Geo. 2. c. 15. *Extends to sending such letters, threatening to kill, &c. or burn houses, &c. though no valuable thing be demanded.*

Ch. XXIII. § 1. *Statutes.*

" subjects, or to burn their houſes, outhouſes, barns, ſtacks " of corn or grain, hay, or ſtraw; though no money or " veniſon, or other valuable thing ſhall be demanded in or " by ſuch letter or letters; or ſhall forcibly reſcue any per- " ſon being lawfully in cuſtody of any officer or other perſon " for the ſaid offence; every perſon ſo offending, being " thereof lawfully convicted, ſhall be adjudged guilty of " felony without benefit of clergy."

30 Geo. 2 c. 24. Sending or delivering letter or writing with or without names, or with fictitious names, &c. threatening to accuſe another of offence puniſhable with death, tranſportation, or infamous puniſhment, with intent to extort; puniſhable as miſdemeanor or with tranſportation.

Laſtly, by ſtat. 30 Geo. 2. c. 24. ſ. 1. " All perſons who " ſhall (after the 29th of September 1757) knowingly ſend or " deliver any letter or writing with or without a name or " names ſubſcribed thereto, or ſigned with a fictitious name " or names, letter or letters, threatening to accuſe any per- " ſon of any crime puniſhable by law with death, tranſporta- " tion, pillory, or any other infamous puniſhment, with a " view or intent to extort or gain money, goods, wares, or " merchandizes from the perſon or perſons ſo threatened to " be accuſed, ſhall be deemed offenders againſt law and the " public peace; and the Court before whom ſuch offender " or offenders ſhall be tried ſhall, in caſe he, ſhe, or they be " convicted of any of the ſaid offences, order ſuch offender " or offenders to be fined and impriſoned, or to be put in the " pillory, or publicly whipped, or to be tranſported as ſoon " as they conveniently may be (according to the laws made " for tranſportation of felons) to ſome of his Majeſty's colo- " nies or plantations in America for the term of 7 years, " as the Court ſhall think fit to order."

Sending threatening letters or meſſages to maſter manufacturers in certain trades. 12 Geo. 1. c. 34. Vide ante, tit. Aſſault, 426.

By the ſtat. 12 Geo. 1. c. 34. ſ. 6. " If any perſon or " perſons ſhall write, or cauſe to be written, or knowingly " ſend, or cauſe to be ſent, any letter, or other writing, or " meſſage, threatening any hurt or harm to any maſter " wool-comber, or maſter weaver, or other perſon concern- " ed in the *woollen manufacture*, or threatening to burn, pull " down, or deſtroy any of their houſes or outhouſes, or to " cut down or deſtroy any of their trees, or to maim or kill " any of their cattle, for not complying with any demands, " claims, or pretences of any of his or their workmen, or " others employed by them in the ſaid manufacture, or for " not conforming, or not ſubmitting to any ſuch (*a*) illegal " by-laws, ordinances, rules, or orders as aforeſaid; every " perſon ſo knowingly or willingly offending in the premiſes,

(*a*) *Vide* ante, 4-5.

" being

"being thereof lawfully convicted, upon any indictment to be found within twelve calendar months next after any such offence committed, shall be adjudged guilty of felony, and shall be transported for 7 years to some or one of his Majesty's colonies or plantations in America, by such ways and means, and in such manner, and under such pains and penalties as felons in other cases are by law to be transported."

Ch. XXIII. § 1. *Statutes.*

Felony and transportation.

Then the stat. 22 Geo. 2. c. 27. s. 12. reciting the above-mentioned law, and "that it was necessary that the said several provisions and regulations in the said last in part recited act should be extended to journeymen dyers, journeymen hot-pressers, and all other persons employed in the woollen manufactures of this kingdom, and also to journeymen, servants, workmen, and labourers employed in the making of felts or hats, and in the manufactures of silk, mohair, fur, hemp, flax, linen, cotton, fustian, iron and leather, or any manufactures made up of wool, fur, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another;" therefore enacts, "That the said several before-recited clauses in the said act, made in the 12th year of his said late Majesty's reign, and all the provisions, regulations, pains, penalties and forfeitures therein contained, shall from and after the 24th of June 1749 extend and be construed, deemed, and adjudged to extend to journeymen dyers, journeymen hot-pressers, and all other persons whatsoever employed in or about any of the *woollen manufactures* of this kingdom; and also to journeymen, servants, workmen, and labourers, and all other persons whatsoever employed in the making of *felts*, or *hats*, or in or about any of *the manufactures of silk, mohair, fur, hemp, flax, linen, cotton, fustian, iron, or leather*, or in or about any manufactures made up of *wool, fur, hemp, flax, cotton, mohair, or silk*, or of any of *the said materials mixed one with another*, in as full and ample manner as the said provisions, regulations, pains, penalties, and forfeitures are by the said last-mentioned act declared to extend to the several and respective persons therein named; and the pains, penalties, and forfeitures which shall be incurred by reason of any offence committed against the said last-mentioned act, by any person

22 Geo. 2. c. 27. s. 12.

The provisions in the recited act, to extend to persons employed in the manufactures enumerated.

Ch. XXIII. § 1. *Statutes.*

" or perſons employed or concerned in or about any of the " ſaid manufactures hereinbefore enumerated, ſhall be in- " flicted, levied, and recovered in the ſame manner as the " pains, penalties, and forfeitures contained in the ſaid laſt " in part recited act are directed to be inflicted, levied, and " recovered upon and againſt the ſeveral and reſpective per- " ſons therein mentioned."

§ 2. *Conſtruction of the ſtatutes.*

The following caſes have occurred on the conſtruction of theſe ſtatutes:

Robinſon's caſe, O.B. Feb. 1796, cor. Lawrence J. MS. Buller J. and MS. Jud. (2 Leach. 869. S. C.) *Vide* Seſſ. Papers, p. 394. for the detail of the evidence.

Michael Robinſon was tried on an indictment charging him with having unlawfully and feloniouſly, &c. ſent a certain letter dated the 12th of January 1796, *without any name ſubſcribed thereto*, to James Oldham Oldham, *demanding* of him *a certain valuable thing*, viz. *a bank note*, againſt the form of the ſtatute, &c.

Sending a threatening letter ſigned R. R. *demanding a Bank-note, and threatening in caſe of refuſal to publiſh a libel charging the proſecutor with murder, is a capital felony within the ſtat.* 9 Geo. 1. c. 22. *which act is not repealed in that reſpect by the ſtat.* 30 Geo. 2 c. 24. *which only reaches caſes falling ſhort of an actual demand, where at the ſame time the letter is ſent with a view or intent to extort money, &c. and which by the latter act is made a miſdemeanor only.*

A BANK NOTE IS A VALUABLE THING, *within the meaning of the ſtat.* 9 Geo. 1. *though not the*

It appeared in evidence that the proſecutor had ſerved an apprenticeſhip with one Daniel Dolly, by whom he was afterwards taken into partnerſhip. That upon Dolly's death, which happened a few years afterwards, a report was ſpread that the proſecutor had been the author of his death, upon which he brought an action againſt two perſons, and had judgment againſt them. That before the letter in queſtion was ſent, ſeveral other letters had been written by the priſoner to the proſecutor, to which he returned anſwers for the purpoſe of obtaining information of the priſoner's place of abode to bring him to juſtice. All theſe letters were read in evidence, as they ſerved to explain the letter upon which he was indicted. They contained an intimation that another perſon who was a friend of the writer, who was in diſtreſs, had put certain MS. into his hands, containing a charge of the proſecutor's having murdered his former maſter, Dolly, and afterwards married the widow his accomplice: that the priſoner was unwilling to publiſh the MS. containing ſo ſerious a charge without giving a previous intimation to him, and hearing what he had to propoſe upon the ſubject. The letter for ſending which the priſoner was indicted, addreſſed to the proſecutor, contained a threat to publiſh the ſaid libel on him, imputing to him the murder of Dolly, and was as follows:

" Tueſday,

Ch. XXIII. § 2. *What letters within the act.*

" Tuesday, 12th January 1796.

" Sir,

I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking. An understanding on such a matter as this is the easiest thing imaginable, and in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage as of wantonly sporting with the feelings of any one, &c. The subject on which I have addressed you has long lain dormant; and it was because I thought the attack of a most serious complexion that I hesitated for such a length of time in giving my countenance to it: not that I ever sought for any circumstances to influence my judgment or qualify my opinion; and for aught that has ever come to my knowledge it may be all the moonshine of the moment. I am therefore so far candid, and I trust not indelicate, and it will at least be a satisfaction to you to be told, (&c.) that not a soul but myself is in possession of a line of the MS.; nor has it ever been out of my hands, or perused or heard by any person living since first I had it: so that *when* it is committed to the flames all will necessarily die with it. Of this you shall have a testimony so clear and unequivocal, that it will not be possible for you afterwards to doubt. Thus much I have suggested for *your* satisfaction. You will now give me leave to say something of the cause I have engaged in. I have no objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must beg leave to adjust; perhaps I may be more anxious to urge them in order to have some proof of your sincerity, after which I am at your service. In order to relieve a destitute and unhappy person struggling with sickness and with sorrow, will you permit me to be your almoner? Will you enable me to dispose of a little of your money as I shall see occasion? It is a duty I owe the cause of humanity to urge it. Remember, Sir, I am now only making an appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute: I am asking you as a gentleman, as a man, to give me some earnest of your intentions to prove what I am so strongly inclined to give you credit for. *Inclose a bank note in a letter addressed to R. R.*, and let it be left at the

subject of larceny at the time of passing the act. It is sufficient if it be a valuable thing at the time of the demand made.

A mere asking of charity is not a demand within the act, but it must be accompanied with some express or implied threat: a requisition which may operate as a force on the mind of the person to whom it is addressed.

But whether a letter contain such a demand is a matter of construction on which the Court will instruct the jury.

The sending such a letter signed with INITIALS ONLY *is a sending of a letter* WITHOUT A NAME.

Both previous and subsequent letters may be received in evidence as explanatory of the letter set forth in the indictment.

Ch. XXIII. § 2. *What letters within the acts.*

Cambridge coffee-houſe, &c. on Thurſday next; and on the ſame day a line ſhall be ſent by a porter to acknowledge the receipt; after which, if you will name any evening to take a bottle of wine at the King's-Head tavern or elſewhere, I will with pleaſure attend you: our meeting is however to be private and tete a tetê. Thus poſſibly over the aſhes of the MS. a phœnix may ariſe that may prove the forerunner to friendſhip," &c.

(Signed) "R.R."

Subſequent letters explanatory of the one ſtated in the indictment given in evidence.

A ſubſequent correſpondence between the proſecutor and priſoner was alſo given in evidence; in the courſe of which the priſoner communicated a few pages of the ſuppoſed MS. in verſe, from which the charge alluded to was to be plainly inferred.

Several objections were urged on the part of the priſoner, which were reſerved for the opinion of the Judges; and Mr. Juſtice Lawrence left it to the jury to ſay whether the priſoner ſent the letter of the 12th of January, and whether it contained a threat to publiſh a libel on the proſecutor, imputing to him the death of Daniel Dolly, unleſs he would ſend him a bank note; and if they were of that opinion, they were directed to find him guilty. The jury found him guilty; and alſo found ſpecially, that the priſoner ſent the letter in the indictment, and that it contained a threat to publiſh a libel imputing to the proſecutor the murder of his maſter, in order to extort money from him.

The objections were argued before all the Judges on the 8th of June 1796, when they were of opinion with the proſecutor on all the points made in argument, and which were afterwards noticed by Mr. Juſtice Buller, who delivered their opinion at the next ſeſſions at the Old Bailey as follows:

MS. Buller J.

Four objections have been made againſt this conviction; 1. That this is not a letter *without a name.* 2. That it does not contain a *threat* or *demand*, ſo as to bring the caſe within the ſtat. 9 Geo. 1. c. 22. 3. That a bank note is not a valuable thing within the meaning of that act. 4. That ſuppoſing this caſe to fall within the words and meaning of that ſtatute, yet it is the preciſe offence deſcribed by the ſubſequent ſtatute of the 30 Geo. 2. which, making it a miſdemeanor only, is a virtual repeal of the prior act of the 9 Geo. 1. on which this proſecution is founded. As to the

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first, whether the letter be with or without a name, is a simple fact appearing on the face of the letter itself. It is signed with two letters R. R., which are so far from being a name, that no man on looking at the letter only can tell whether it meant to refer to any name, or what that name was. The second and third objections depend on the words of the stat. 9 Geo. 1. and the true construction of that act. The words of the enacting clause speak of *a demand* generally, without requiring any particular circumstances other than its being by letter without a name, or in a fictitious name, to accompany that demand. But the preamble of the act recites, that several persons had of late associated themselves under the name of Blacks, and entered into confederacies to assist one another in stealing deer, robbing warrens, and other illegal practices, and had in great numbers, armed with offensive weapons, several of them with their faces blacked, or in disguised habits, unlawfully hunted, &c. "and have sent letters *in fictitious names* to several persons *demanding* venison and money, and threatening some great violence if such their unlawful demands should be refused," &c.: and it was contended for the prisoner, that the enacting clause ought to be restrained by the preamble, or at least so far that *the demand* must be direct and peremptory, and accompanied with a threat of bodily harm. Where the enacting clause of a statute refers to such offences only as are mentioned in the preamble, it may thereby be controlled or restrained; but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions if it were so restrained. It is no uncommon thing for a statute to recite a particular mischief as the cause of making the statute, and yet for the enacting part of it to embrace more general objects, and to extend to other cases, which the Legislature thought within equal mischief. If the enacting clause in this act were to be restrained by the preamble, it would apply only to cases where several persons had joined together; where the letter was written in a fictitious name only; and where the thing demanded was either venison or money. But the enacting clause in express words applies to a single offender; to a letter sent *without a name* as well as to one signed *with a fictitious name;* and to a demand of *any valuable thing* as well as of money or venison; and to all

Vide preamble, ante, 1107.

demands

Ch. XXIII. § 2. *What letters within the acts.*

demands by such letters, *whether accompanied with a threat of bodily harm, or not.* I agree that a mere request, such as asking charity, without imposing any conditions, would not come within the sense or meaning of the word *demand* (*a*): but here the demand is, as the jury truly said when they found a general verdict of guilty, under a threat to publish a libel attributing to the prosecutor the murder of his master. Whether the letter do amount to such a demand or not is a question which the Judges are bound to pronounce upon reading it as it is set out on the record; and they are all clearly of opinion that it is a demand within the true intent and meaning of the statute. It is a demand of money or money's worth, (which a bank note is), by means of holding out a threat to impute murder to the prosecutor, and to blast his fame and character, and not a request of voluntary charity. That a bank note was a valuable thing at the time when the demand was made was rightly admitted by the prisoner's counsel; but it was contended, that it was not so when the statute 9 Geo. 1. was made, because it was not then the subject of larceny. The Judges however are all of opinion, that if the thing demanded be valuable at the time that the demand is made, that is sufficient (*b*), though the thing demanded did not exist, or the value of it was not known when the statute was made. But in truth it was a valuable thing at the time that the statute was made, though it might not come under the denomination of goods and chattels, or be the subject of larceny; for it was the evidence of a debt; it might at any time be turned into cash, and was to the owner of the value of the money for which it was given. 4. The only remaining question is, whether the statute 9 Geo. 1. on which this prosecution is founded were repealed by the stat. 30 Geo. 2. c. 24. It was truly contended, that if one act of parliament make a particular case a capital offence, and a subsequent act make the *same case* only a misdemeanor, the last act is a repeal of the former: and so it was decided in Davis's case, in November 1783, on

Ante, 609.

(*a*) Upon the debate of this case Eyre C. J. said, "*a demand* (within the act) "must be something more than asking: it is a requisition in the shape of forcing." And another of the Judges observed, that it meant "asking money, &c. and "holding out a threat at the same time to enforce it."

(*b*) Lord Kenyon C. J. and Eyre C. J. expressly declared themselves of this opinion on the debate.

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Ch. XXIII. § 2. *What letters within the act.*

the very act of the 9 Geo. 1. which makes it a capital offence to kill, wound, or deſtroy, any deer in any foreſt or park, the ſtatute 16 Geo. 3. c. 30. having made that offence *in the ſame words* a miſdemeanor only. But if the two ſtatutes are conſiſtent and can both ſtand together, the rule does not apply, and the laſt act will not be a repeal of the firſt. Here the ſtat. 9 Geo. 1. extends to ſuch caſes only in which there is an *actual demand*; and the ſtat. 30 Geo. 2. reaches caſes which fall ſhort of a demand, and includes letters ſent *with a view or intent* to extort money, though no demand be made. The conſequence is, that neither of the objections is well founded, and the conviction is right.

Upon the conference on the above caſe it was agreed by all the Judges, that if the indictment were framed upon the ſtat. 30 Geo. 2. and a demand proved, there muſt be an acquittal.

Jepſon and Springett's caſe, Eſſex Sum. Aſſ. 1798, cor. Lord Kenyon C. J. MS. Jud. *Conviction on the* 27 Geo. 2. c. 15. *for ſending a letter to the proſecutor threatening "to ſet fire to his "mill, and likewiſe to do all "the public injury they were "able to him in "all his farms "and ſtores;" held wrong; he not then having any* MILL *to which the threat of burning would apply (having parted with it three years before), and the threat as to the* FARM, &c. *not neceſſarily implying a* BURNING.

John Jepſon and George Springett were indicted upon the ſtat. 27 Geo. 2. c. 15. for ſending to the proſecutor Mr. Woodgate the following Letter.

March 3d 1798.

Mr. Woodgate—Sir, I am very ſorry to acquaint you that we are determined to ſet your mill on fire, and likewiſe to do all the public injury that we are able to do you, in all your *farms and ſeteres* (*a*) which you are in poſſeſſion of, without you on next —— (*b*) day releaſe that Ann Wood which you put in confinement. Sir, we mention in a few lines, and we hope if you have any regard for your wife and family, you will take our meaning without any thing further; and if you do not we will perſiſt as far as we poſſibly can, ſo you may lay your hand at your heart and ſtrive your uttermoſt ruin. I ſhall not mention nothing more to you, until ſuch time as you find the few lines a fact, with our reſpect. So no more at this time from me,

R. R.

It was proved that the letter was of the hand-writing of Jepſon, and that it was thrown by the other priſoner into Mr. Woodgate's yard, from whence it was taken by a ſervant of Mr. Woodgate and delivered to him. Mr. Wood-

(*a*) By this was underſtood *ſettings* or lettings. The whole letter was evidently the production of an illiterate perſon, being ſafely ſpelt nearly throughout.

(*b*) The word here was unintelligible in my copy.

gate

Ch. XXIII. § 2. *What letters within the act.*

gate swore that he had had a share in a mill three years before this letter was written, but had no mill at that time. That he held a farm when the letter was written and came to his hands, and still holds it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the act of parliament. (27 Geo. 2. c. 15.)

At a conference of the Judges, after conviction, in Michaelmas term 1798 (absent Eyre C. J.) it was agreed that the prosecutor having no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. But as to the rest of it, Lord Kenyon C. J. and Buller Justice were of opinion that the letter must be understood as also importing a threat to burn the prosecutor's farm-house and buildings: but the other Judges not thinking that a necessary construction, the conviction was holden wrong, and a pardon recommended.

Girdwood's case, post, f. 4.

But in Girdwood's case after mentioned, a letter accusing the prosecutor of having taken away the life of a friend of the writer's, who was *come to revenge him*, was ruled to be evidence to go to the jury upon a charge of sending a letter threatening *to kill and murder* the prosecutor.

Heming's case, Warwick Sum. Ass. 1799, cor. Chambre B. MS. Jud. *A threatening letter, referring in the terms of it to such circumstances as were plainly intended to denote who the writer was, and making a demand of a sum of money in controversy between him and the prosecutor, which the latter had received, and which the former had before insisted should be accounted for to him, is not a threatening letter within the stat.* 9 Geo. 1. c. 22. *or* 27 G. 2. c. 15. *although the writer did not subscribe his name.*

John Heming was indicted for sending a threatening letter to William James, an attorney at Henley, without any name subscribed to it. The indictment consisted of four counts, two upon the stat. 9 Geo. 1. c. 22. describing the letter as a letter demanding money, and the other two on the stat. 27 Geo. 2. c. 15. describing it as a letter threatening to kill and murder. The letter produced in evidence was directed to William James the prosecutor, and was in the following words, corresponding with the description in the indictment: "Mr. James, before I put my intentions in force I thought "it proper to acquaint you with the same. I am determined you shall die with a leaden fever if you don't pay the "money you have taken out of the court of King's Bench; "as I can't rest to think of the usage I received from you: "it is worse than murder." This letter was proved to be in the hand-writing of the prisoner, who sent it to the post-office, from whence it was sent in the usual manner to the prosecutor. But it also appeared in evidence that the prosecutor had formerly been employed in his profession as an attorney

torney by the prisoner's deceased mother in her lifetime; that in the course of that employment he had, as her attorney, received a sum of 20 l. and upwards out of the court of K. B.; and that the prisoner, who had been reduced to great poverty, had conceived an opinion that the prosecutor had wronged him by not accounting for that sum. That for five or six years last past the prisoner had very frequently demanded the money, and abused the prosecutor very much for refusing to pay it, threatening to set fire to his house, and using other menaces. That this was done most frequently when he was in liquor, and on many occasions when he was sober. That the prosecutor had frequently corresponded with the prisoner, and was well acquainted with his hand-writing: and that the letter in question was written in his usual manner without any disguise of the character. The jury found the prisoner guilty; but Chambre B., before whom he was tried, respited the sentence in order to take the opinion of the Judges, whether as the transactions previous to the sending of the letter, the hand-writing, and the contents of the letter itself, shewed clearly who was the writer, and that he could have no intention to conceal himself; the case came within the meaning of either of the acts of parliament, although no name was subscribed to the letter. On the first day of Michaelmas term 1799 all the Judges assembled held that the conviction was wrong: for the prisoner making himself known in the letter, was the same thing as if he had signed his name to it; and therefore such a letter was not within the true spirit of the act. He was accordingly recommended for a pardon.

Ch. XXIII. § 2. *What letters within the acts.*

(Abſent Buller J.)

§ 3. *Diſtinctions between the ſeveral ſtatutes as to names.*

It is evident from the whole ſcope of the acts of the 9 Geo. 1. and 27 Geo. 2. making the offences therein deſcribed felony, that they were levelled againſt ſuch whoſe intention it was (by writing ſuch letters either without names or in fictitious names) to conceal themſelves from the knowledge of the party threatened, that they might obtain their object by creating terror in his mind without incurring danger and reſponſibility themſelves. In this reſpect the ſubſequent act of the 30 Geo. 2. c. 24. which only makes the offence a miſdemeanor, though puniſhable with tranſportation, is very differently worded from the other two, for it extends to any letter "*with* or without *a name*," &c. *or* ſigned

Ch. XXIII. § 3. *Distinction between statutes.*

signed with a *fictitious* name, &c.; and therefore it may well include letters (in other respects within the scope of it), though signed in the writer's real name.

Letters, writing, and messages.

It is also observable that the latter statute has the word "*writing*" as well as "*letter*," which is not included in the enacting part of the prior statutes, though it occurs in the preamble to the first of them, and the stats. 12 Geo. 1. and 22 Geo. 2. extend even to *messages*.

Thing demanded.

Another difference between the several acts is with respect to the thing demanded: this under the stat. 9 Geo. 1. must be "money, venison, or other valuable thing:" which latter description includes a bank note, as was before shewn in Robinson's case. But under the stat. 27 Geo. 2. the guilt is incurred, though there be no demand made of any thing in the letter: and the stat. 30 Geo. 2. only reaches cases where the letter falls short of an actual demand, but is sent "with intent to extort or gain *money, goods, wares, or merchandise.*"

Ante, f. 2.

Intent.

Major's case, O. B. June 1796, and before all the Judges in Mich. T. 1796, MS. Buller J. and MS. Jud. *Indictment on the stat.* 30 Geo. 2. c. 24. *for sending a threatening letter* intending to extort and gain money, *cannot be supported by shewing a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain bill drawn by the prisoner, of which the prosecutor was the holder.*

In Edward Major's case the indictment charged that the prisoner *intending to extort and gain money* from one Augustine Rayner, unlawfully, knowingly, and designedly sent to the said A. R. a certain letter in writing, &c. thereby threatening, &c., and then set forth the letter as follows: "Sir, I "received a letter respecting the bill which I gave you "when we parted: and as you know I have it not in my "power to pay it; and if I had, it is an unjust demand; I "have only to observe, that if you do not immediately return "it to me as an acknowledgment for the obscene offence of "sodomy attempted upon me, &c. I am determined to pro"secute you to the utmost rigor of the law, &c. (Signed) "E. Major, (and dated) June 1st, 1796;" *with a view and intent to extort and gain money* from the said A. R. against the form of the statute, &c. The Judges, on reference to them after conviction, in Michaelmas term 1796 held the conviction wrong; for the letter was not sent to extort *money*, but to procure the delivery up of the *bill*.

§ 4. *What a sending of the letter.*

Further, the stats. 9 Geo. 1. and 27 Geo. 2. prohibit any person from "*knowingly sending*" any letter such as is therein respectively described. The stat. 30 Geo. 2. extends to such

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as "knowingly send *or deliver* the letters;" and the ſtats. 12 Geo. 1. and 22 Geo. 2. to ſuch as "write, or cauſe to "be written, or knowingly ſend or cauſe to be ſent any "letter," &c.

Ch. XXIII. § 4. *What a ſending or delivery.*

John Hammond and Mary Hammond were indicted on the ſtatutes 9 Geo. 1. c. 22. and 27 Geo. 2. c. 15. for feloniouſly ſending a threatening letter to Daniel Dancer, demanding the ſum of 10l. The indictment conſiſted of twelve counts, one ſet charging that the priſoners ſent and delivered the ſaid letter; and another, that they cauſed it to be ſent and delivered. It appeared in evidence that the priſoners were huſband and wife, and lived as ſervants with the proſecutor. That Mary Hammond had written the letter in queſtion, and that it was delivered to the proſecutor by John Hammond, who ſaid he found it in the proſecutor's garden; but there was no evidence that he had any knowledge of its contents. On behalf of the priſoner it was ſubmitted to the Court, that the offence deſcribed by the ſtatutes on which the indictment was founded, was the "knowingly *ſending*" a threatening letter, &c.; but that the evidence only proved that the wife had written the letter, and that the huſband had delivered it; and that there was no proof of its having been *ſent* to the proſecutor. The Court agreeing as to the deſcription of the offence in the ſtatutes, obſerved, that in caſes ſo highly penal as the preſent it was neceſſary not only to conſider the intention of the Legiſlature, but to bring the offender within the words of the ſtatute. That the mere act of *writing* a threatening letter would not conſtitute the offence; for unleſs the writer or contriver of ſuch a letter afterward ſent it to the party whoſe fears it was calculated to alarm, it could not produce the miſchief which the Legiſlature intended alone to ſuppreſs; and they had accordingly adapted the words of both the ſtatutes to that exigency, viz. if any perſon ſhall *ſend* "any ſuch letter, &c. he ſhall be guilty of felony," &c. That it was impoſſible to conceive, that *carrying* a letter could by any conſtruction be comprehended under the words "*ſend* any letter," which were the preciſe terms in which the ſtatutes were penned. That the Court was not to conſider what the Legiſlature would have done if they had contemplated ſuch a caſe as the preſent, but to look at the words they had uſed, and to conſtrue them according

Hammond's caſe, O. B. May 1787, cor. Aſhurſt J. and Perryn B. 2 Leach, 499. *Where the wife wrote a threatening letter, and the huſband* CARRIED *it to the party threatened; held that the huſband, though privy to the writing, was not within the ſtatutes* 9 Geo. 1. *and* 27 Geo. 2.; *nor could the wife alone be convicted, unleſs ſhe wrote and ſent it without the huſband, who delivered it, being privy to the contents.*

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according to the meaning which it was moſt likely they entertained at the time the ſubject was under their conſideration. Then at the time thoſe ſtatutes paſſed, it ſeemed that the Legiſlature never had it in contemplation that any perſon would be the carrier of a threatening letter which he himſelf had written or contrived. They undoubtedly conceived that ſuch a letter would be ſent by the poſt, or by ſome ſecret conveyance, ſo as to prevent the diſcovery of the perſon by whom it was ſent. It was clear therefore that the act of delivering a threatening letter was not the offence deſcribed in the ſtatutes of 9 *Geo.* 1. *c.* 22. and 27 *Geo.* 2. *c.* 13. But if any doubt could be entertained upon that point, the Legiſlature itſelf had removed it; for by the ſubſequent act of the 30 *Geo.* 2. *c.* 24. the offence of *delivering* as well as *ſending* a threatening letter was made a miſdemeanor, puniſhable in the diſcretion of the Court, according to the circumſtances of the caſe. That ſtatute made it evident, that where the Legiſlature intended to extend the deſcription of the offence, they knew how to make uſe of proper words to expreſs that intention; and it ſhewed that they had it not in contemplation to make the *delivery* of a threatening letter felony, when the ſtatutes on which the preſent indictment was founded were paſſed. But, as the Court further obſerved, there was ſtill a queſtion in this caſe for the conſideration of the jury; for though Mary Hammond were the wife of the other priſoner, yet if the jury were of opinion that ſhe wrote the letter herſelf, without any interference of her huſband, and ſent it by him, without his knowing any thing of the contents, to the proſecutor, ſhe alone might be found guilty; but otherwiſe, both the priſoners muſt be acquitted. The jury upon this direction acquitted both the priſoners.

Girdwood's caſe, O. B. Feb 1776, MS. Crown Caſ. Reſ. and MS. Gould and Buller Js. (1 Leach, 169. S. C.) *Evidence that the priſoner delivered a threatening let-*

Archibald Girdwood was charged on the ſtat. 27 Geo. 2. c. 15. in the firſt count of the indictment generally for feloniouſly ſending a certain letter in writing with the fictitious letters of J. W. ſubſcribed thereto, to one John Edridge, &c. threatening to kill and murder him. The ſecond count was for ſending a letter to the ſame purport, ſetting out the letter in words and figures as follows:

"Sir,

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"Sir, "Feb. 9, 1796."

"I am sorry to find a gentleman like you would be "guilty of taking Mr Alleſter's life away for the ſake of two "or three guineas; but it will not be forgot by one who is "but juſt come home to revenge his cauſe. This you may "depend upon, whenever I meet you I will lay my life for "him in this cauſe. I follow the road, tho' I have been "out of London; but on receiving a letter from Mr Alleſ- "ter before he died, for to ſeek revenge I am come to town. "I remain a true friend to Mr Alleſter.

"J. W."

ter ſealed up to another by whom it was put in the poſt, and ſo conveyed to the proſecuter, is ſufficient to go to the jury that he ſent ſuch letter knowing the contents. A letter accuſing the proſecutor of having taken away the life of a friend of the writer's, who was come to revenge him, is evidence to go to the jury of ſending a letter threatening to kill and murder the proſecutor. The trial may be where the proſecutor received the letter by the poſt, tho' delivered by the priſoner, and put into the poſt in another county.

Edridge proved the receipt of the letter by the penny poſt at his houſe in Davis ſtreet, Berkeley-ſquare, which is in the county of Middleſex; and his tracing it up to one Elizabeth Robinſon, who ſwore that ſhe was employed in going errands for the priſoners in Newgate; and that having on the 9th of February received this letter from the priſoner's hands at the grate at Newgate, ſhe immediately carried it to the poſt-office in Newgate-ſtreet. The ſervant of the office-keeper confirmed her account: and both ſwore to the identity of the letter, the direction being in a remarkable hand.

Mr. Baron Hotham directed the jury, which was of Middleſex, to conſider, 1ſt, Whether from the priſoner's delivering the letter he knew the contents of it? 2dly, Whether they thought the letter itſelf contained in the terms of it an actual threatening to kill and murder? If they were of opinion that it did, and that the priſoner knew the contents of it, they ought to find him guilty; but if they thought he did not know the contents, or that the words might import any thing leſs than to kill or murder, they ſhould acquit him. The jury found him guilty; but judgment was reſpited to take the opinion of the Judges on the following points: 1. Whether there were ſufficient evidence to be left to the jury of the priſoner's ſending the letter *knowing the contents?* 2. Whether the letter purported to be a letter threatening to kill or murder? 3. Whether the priſoner were properly tried by a Middleſex jury; the letter, though received by Edridge in Middleſex, having been delivered by

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the priſoner to E. Robinſon in London, and by her put into the office, which is alſo in London?

(Abſent De Grey C. J. and one place vacant.) *Vide* Lloyd v. Maund, 2 Term Rep. 760. S. P.

In Eaſter term 1776, ten Judges preſent were all clearly of opinion that the conviction was right. They thought that the conſtruction of the letter was properly left to the jury; as alſo whether the priſoner knew the contents of it; and that there was no objection to the trial being had before a Middleſex jury. The priſoner was afterwards executed.

Ante, 1116.

In Heming's caſe, the letter was alſo ſent by the medium of the poſt.

Lloyd's caſe, poſt, ſ. 5.

In Lloyd's caſe, the letter was dropped in a veſtry-room frequented by the proſecutor every Sunday morning, where it was picked up by the ſexton and given to the proſecutor: and Mr. Juſtice Yates had no doubt but that this was a ſending within the act.

Ante, 1115.

So in Jepſon and Springet's caſe, the letter was thrown into the proſecutor's yard, from whence it was taken up by the proſecutor's ſervant and delivered to him.

Indictment and Evidence.

§ 5. *Indictment and evidence.* 2 MS. Sum. 329. *Vide* Cr. Cir. Comp.

The indictment for ſending an incendiary or threatening letter muſt ſet forth the letter itſelf, that the Court may judge whether it be one of that kind which falls within the purview of the reſpective ſtatutes.

Lloyd's caſe, Hereford Sp. Aſſ. 1767, cor. Yates J. MS. ut ſupra and MS. Buller J. *Indictment for ſending a threatening letter muſt ſet out the letter. Stating that the priſoner ſent ſuch a letter, directed to the proſecutor, &c. ſeems ſufficient, without expreſsly alleging that the priſoner ſent it to the proſecutor.*

In Lloyd's caſe, who was tried by Mr. Juſtice Yates, the indictment only followed the words of the Black Act (9 Geo. 1. c. 22.), and charged that the priſoner "knowingly, "unlawfully, wickedly and feloniouſly, did ſend a certain "letter in writing, without any name ſubſcribed and ſigned "thereto, directed to one Edward Salway, by the name of "Edward Salway Eſq. demanding money, to wit, 100 gui-"neas, &c. to the great damage of the ſaid E. S. and againſt "the form of the ſtatute, &c." After conviction, it was moved in arreſt of judgment, that the indictment was bad in two reſpects; firſt, Becauſe it did not charge that the defendant *ſent* the letter *to Mr. Salway* the proſecutor, but only that he *ſent* (without ſaying to whom) a certain letter *directed to Mr. Salway*. Secondly, Becauſe neither the letter nor even the ſubſtance of it was ſet forth in the indict-

ment.

ment. The learned Judge, in reporting the case afterwards to the rest of the Judges, observed, as to the first objection, that it had no degree of weight with him: for it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. The fact being that the prisoner dropped the letter into a vestry-room which Mr. Salway frequented (*a*) every Sunday morning before service began, from whence the sexton had picked it up, and delivered it to him. But the second objection seemed to him a very strong one; and therefore he respited judgment for the opinion of the Judges upon it. It was argued for the prosecutor that this indictment pursued the very words of the statute 9 Geo. 1. c. 22., which in general cases was holden to be sufficient. That the defendant was charged with sending this letter "feloniously, and contrary to the form of the statute;" and that those words import that the letter was of such a nature as the statute had in view. That the jury had found the defendant guilty to the whole extent of that charge; and therefore it must be taken that the letter which was proved to the jury, and upon which their verdict was founded, was a menacing letter, and within the true meaning of the statute. That if it were not such a letter it was to be presumed that the prisoner would have been acquitted, as all these trials were superintended by a Judge who must be supposed to give proper directions to the jury. In answer, it was admitted that in general cases, if an indictment on a statute pursued the words of the statute itself, it was sufficient; but those were cases where the words of the statute contained a complete description of the offence. But when

(*a*) *Qu.* Whether if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending *to such party*, supposing such an allegation to be necessary upon the true construction of the acts? The same sort of evidence was given in Springett's case, before mentioned, in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form. Upon the whole, it became unnecessary for the Judges to give any opinion on this point of the case in question.

Ante, p. 1115.

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the ſtatute related to a particular kind of letter, the indictment ſhould ſtate the letter itſelf, that the Court might ſee whether it were one of that kind. That in every indictment a complete offence muſt be ſhewn, ſo as to enable the Court to give judgment upon it in caſe a demurrer were joined or a writ of error brought. But if the words "feloniouſly" and "contrary to the ſtatute" ſhould be deemed ſufficient, it would leave the conſtruction of the law to the jury. That in all indictments of forgery the inſtrument forged muſt be ſet forth, that the Court might ſee that it was one of that kind which fell within the purview of the ſtatute. Mr. Juſtice Yates further ſtated, that he had ſince cauſed inquiries to be made into the practice of the Old Bailey, and upon the Weſtern and Home Circuits, and found that in all indictments upon this act of parliament the letter itſelf was generally ſet forth. And that the clerks did not remember an inſtance where the indictment did not ſtate at leaſt the ſubſtance of the letter. In Trinity term following the Judges were conſulted on this caſe; and they were of opinion that the indictment was bad in not ſetting forth the letter itſelf. For if the words "feloniouſly and contrary to the form of the ſtatute" were allowed to ſupply the place of the letter, it would be leaving it to the proſecutor to put his own interpretation upon it, and to the jury the conſtruction of the matter of law.

Not only the letter itſelf muſt be truly ſet out in the indictment, but the alleged intent of the writer in ſending it muſt be ſuch as is conſiſtent with and deducible from the letter. Therefore, where, in Major's caſe, the allegation was, that the letter was ſent to extort *money*, and it appeared upon the face of it to have been ſent with a view of procuring the delivery up of a bill of exchange, the allegation was holden not to be ſuſtained.

Major's caſe, ante, 1118.

§ 6. *Evidence.*

It appears from Robinſon's caſe, before mentioned, that prior and ſubſequent letters from the priſoner to the party threatened may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed.

Robinſon's caſe, ante, 1110.

Trial.

Trial.

§ 7. *Trial.*

Under the 14th clauſe of the act of the 9 Geo. 1. c. 22. the trial may be had in any county in England at the option of the proſecutor. But no expreſs proviſion is made to extend the ſame privilege to caſes falling under either of the ſtatutes of Geo. 2., which muſt therefore be governed by the general rule. If it be a neceſſary ingredient in this offence that the threatening letter ſhould come to the hands of the party threatened, then it ſeems that the county wherein it is ſo received is that in which the trial ſhould properly be had, becauſe till then the offence is not complete. But if the mere act of *ſending* ſuch a letter with intent that the threat therein contained ſhould reach the proſecutor, conſtitute the offence, a conſtruction which the words of the enacting clauſes will ſatisfy, and which may be thought to be confirmed by the opinion of Mr. Juſtice Yates in Lloyd's caſe; then it follows that the trial may be had in any county into which the letter goes in the progreſs of ſuch ſending. It has indeed been ſometimes contended on behalf of a priſoner indicted where the letter was received, that the trial could only be had in the county where the original ſending by the act of the priſoner himſelf was proved: but this has been over-ruled; and the venue has been holden to be well laid in the county in which the letter was received by the party to whom the threat was addreſſed. But I can find no caſe where the venue has been laid in any other than that county where this point has come in judgment. In Girdwood's caſe the trial was had in the county where the threatening letter was received. And ſo it was in the following caſe.

Vide Mortis's caſe, ante, 1032.

Vi. ante, 1119.

Ante, 1122.

Ante, f. 4.

An indictment on the ſtat. 30 Geo. 2. againſt two defendants for ſending a letter to the proſecutor, threatening to accuſe him of an unnatural crime, with intent to extort money from him, laid the offence in Middleſex, but the letter was dated from Maidſtone in Kent. The ſending it was proved by the defendant's confeſſion. It was objected that as the letter was dated and ſent by the poſt from Maidſtone, the fact of the ſending, which conſtituted the offence,

Eſſex's caſe, Weſtminſter Sittings after Trin. 7 Geo. 3. MS. Buller J. *The offence of ſending a threatening letter may be laid in the county where it is delivered by the poſt.*

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offence, was committed in Kent, and the indictment would not lie in Middlesex. But Lord Mansfield C. J. held, that as it was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex; for the whole was to be considered as the act of the defendant to the time of the delivery in that county.

Printed by A. Strahan, Law Printer to His Majesty,
Printers-Street, London.

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